SHDKT PROCEEDINGS AND ORDERS DATE: [01/14/91]

CASE NBR: [90106371] CSY STATUS: [DECIDED]
SHORT TITLE: [Rodriquez, Frank]
VERSUS [Colorado] DATE DOCKETED: [112890]
*** CAPITAL CASE *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Oct 9 1990	G	Application (A90-274) to extend the time to file a petition for a writ of certiorari from October 29, 1990 to December 27, 1990, submitted to Justice White.
2	Oct 10 1990		Application (A90-274) granted by Justice White extending the time to file until November 28, 1990.
5	Oct 10 1990	C	Application (A90-275) for a stay of execution of sentence of death, submitted to Justice White.
6	Oct 18 1990		Response to application (A90-275) from respondent Colorado requested by Justice White, due October 25, 1990.
7	Oct 23 1990		Response to application (A90-275) filed by respondent Colorado.
3	Nov 29 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
8	Dec 12 1990	X	Brief of respondent Colorado in opposition filed.

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [01/14/91]

CASE NBR: [90106371] CSY STATUS: [DECIDED]
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*** CAPITAL CASE *** PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
9	Dec 13 1990		DISTRIBUTED. January 4, 1991
10	Dec 13 1990		Application (A90-275) referred to the Court by Justice White. January 4, 1991 Conference.
12	Jan 7 1991		REDISTRIBUTED. January 11, 1991
13	Jan 7 1991		(A90-275) January 11, 1991 Conference.
15	Jan 14 1991		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall. (Detached opinion.)

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EDITOR'S NOTE

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ORIGINAL

No. A-274

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

90-6371

FRANK D. RODRIGUEZ,
~~Petitioner~~

v.

STATE OF COLORADO,
Respondent

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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No. A-274

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

FRANK D. RODRIGUEZ,
Petitioner

v.

STATE OF COLORADO,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

Frank D. Rodriguez petitions this Court to issue a writ of certiorari to the Supreme Court of Colorado and to review its decision in this cause, and for this court to vacate the death sentence which has been imposed on Mr. Rodriguez in violation of the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the exclusion of mitigation evidence on several important issues in this capital case violated the Due Process, Cruel and Unusual Punishment, Confrontation and Compulsory Process Clauses and was contrary to this Court's decisions in *Gardner v. Florida*, 430 U.S. 349 (1977), *Lockett v. Ohio*, 438 U.S. 568 (1978), and *Skipper v South Carolina*, 476 U.S. 1 (1986),

especially where the excluded evidence would have rebutted several aggravating factors upon which the state relied as reasons for a death verdict, and where the trial court had in one instance ruled that the state could not rely on such a factor, causing the accused to forego any opportunity to present his evidence?

II. Whether allowing the jurors in this capital case to consider sympathy for the victim and the victim's family, and to base their decision on their positive emotional reaction to the victim, including 'putting themselves in the shoes of the victim,' based on matters not legitimately directly related to the charges against the accused, violated the Sixth, Eighth and Fourteenth Amendments and was inconsistent with this court's holdings in *Booth v Maryland*, 482 U.S. 496 (1987), *South Carolina v. Gathers*, 490 U.S.___, 104 L.Ed.2d 867 (1989), and *e.g.*, *Zant v. Stephens*, 462 U.S. 862 (1983)?

III. Whether requiring the jurors to unanimously agree on the existence of mitigating factors in this capital case violated the Eighth and Fourteenth Amendments and this court's decisions in *McKoy v. North Carolina*, ___ U.S. ___, 108 L.Ed.2d 369 (1990), and *Mills v. Maryland*, 486 U.S. (1988)?

IV. Whether allowing the jury in this capital case to consider any criteria or factor in sentencing, without guidance or limitation on its discretion, including bias, prejudice and public opinion against the accused, the many improper arguments of the prosecutors, the races of the accused, Hispanic, and the victim, white, the demands of the victim's family and of the community for death, sympathy for the victim and her family, and the jurors' emotional reactions to their imagined agony caused by their 'putting themselves in the

shoes of the victim,' violated the Due Process, Cruel and Unusual Punishment and Trial by Jury Clauses?

V. Whether the Colorado Supreme Court's holding that the sentencing jury's consideration of the "especially heinous cruel or depraved" statutory aggravating factor was harmless error is inconsistent with this court's decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, __U.S.__, 108 L.Ed.2d 725 (1990), and violated the Sixth, Eighth and Fourteenth Amendments?

VI. Whether the state court's decision upholding the death sentence in the face of numerous jury instructions and comments by the trial court and prosecutors to the effect that, at best, any jury verdict of death was not final and not binding on the trial court, which would itself decide whether a death sentence would be imposed, in contradiction to Colorado law, was inconsistent with *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and violated the Sixth, Eighth and Fourteenth Amendments?

VII. Whether the prosecution's egregious and extensive misconduct during closing arguments at the penalty phase violated the Due Process, Trial by Impartial Jury and Cruel and Unusual Punishment Clauses, especially when combined with the trial court's order to defense counsel not to object to the state's misconduct?

VIII. Whether the failure of the State of Colorado to provide an adequate record on appeal in this capital case, and the refusal of the Supreme Court of Colorado to require or allow the manifestly incomplete, deficient and

incorrect record on appeal to be corrected or completed before or after the briefs were filed, and that Court's proceeding to decide the case on the basis of that incomplete and incorrect record, violated the Due Process, Equal Protection, Right to Counsel and Cruel and Unusual Punishment Clauses?

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OPINION BELOW

The decision of the Colorado Supreme Court, 794 P.2d 965 (Colo. 1990), is reprinted as Appendix 1.

JURISDICTION

The decision of the Colorado Supreme Court affirming the convictions and death sentence was entered on May 29, 1990 and was modified on July 30, 1990. The order of the Colorado Supreme Court denying the timely Petition for Rehearing was entered on July 30, 1990. Appendix 2. On October 10, 1990, Justice White granted an extension of time until November 28, 1990, for the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial by impartial jury . . . ; to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Colorado Revised Statute § 16-11-103 is the death penalty statute applied in this case and is contained in Appendix 3 to this petition.

Colorado Appellate Rule 10, concerning the preparation and correction of records on appeal in Colorado is contained in Appendix 4 to this petition.

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings

Frank Rodriguez was convicted in December, 1986, of the 1984 kidnapping, aggravated robbery, motor vehicle theft, sexual assault and murder of Lorraine Martelli, a 54 year-old, unmarried bookkeeper at a well-known business in Denver. Miss Martelli was kidnaped by Mr. Rodriguez, his brother Christopher Rodriguez, 16 year-old Patricia Thomas and her boyfriend, David Martinez, as she walked to her car after work. They drove in Miss Martelli's auto for several hours before Ms. Martelli was stabbed to death. The police soon arrested all four individuals. The primary state's witness was Patricia Thomas, who was granted immunity. Martinez was also given a favorable plea bargain, although he did not testify. At trial the state acknowledged their equal guilt in the offenses charged against Mr. Rodriguez. Ms. Thomas was the beneficiary of numerous other actions by the state regarding her other criminal activities, and was the only source of most of the alleged details of the crimes.

At trial Mr. Rodriguez did not actively dispute his guilt of the charged offenses except after deliberation, intentional first-degree murder, on the grounds that he had not killed Ms. Martelli, and aggravated robbery on the ground that only simple robbery had been proven. There was substantial evidence that Martinez had actually stabbed the victim, and that the knife used belonged to Patricia Thomas, who had given it to Martinez. The state argued both that Mr. Rodriguez was the killer and that he was guilty as a complicitor.

Mr. Rodriguez was found guilty of all of the charged offenses and the jury also found that he was an "habitual offender," requiring that he receive life sentences on all of the substantive charges.

At the penalty phase, the state presented evidence that Mr. Rodriguez had previously committed a kidnapping and sexual assault and that he had shot a man who was soliciting a prostitute. Mr. Rodriguez presented extensive evidence concerning his background and upbringing.

The jury returned findings on six of the seven statutory aggravating factors alleged by the state and a verdict that the sentence should be death. The court formally imposed the death sentence in January of 1987.

B. Facts Relevant to the Issues Presented.[1]

I. Mr. Rodriguez moved unsuccessfully before trial to present evidence in mitigation on several matters, including a) prison conditions if Mr. Rodriguez were to be sentenced to life in prison; b) the infliction of the death penalty and its cruel and unusual nature; c) evidence of other cases in which the state had not sought death, in order to demonstrate the disproportionate use of the death penalty and also to inform the jury of community standards regarding its imposition. (v. 1, p. 165, 192, 198; v. 2, p. 245; v. 10, p. 112; Defendant's Exhibits 34, 35, 36, 37; these motions are in Appendix 8).

Before arguments at the penalty phase, Mr. Rodriguez moved *in limine* to preclude the state from arguing "fear of escape" as an aggravating factor. (v.3, p.680; Appendix 8) Counsel informed the court that he wished to present available evidence regarding security at the prison if the court denied the motion. The court agreed that such arguments would be improper and granted the motion. (v.33, p. 4-5) Mr. Rodriguez thus did not present his evidence.

During closing arguments, the state argued extensively that a) prison

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1. References to the record in the Colorado Supreme Court are in the form of (v.1, p.1), which refer to volume and page numbers.

conditions were pleasant, with many amenities; b) the death penalty was a humane, painless, quick process, with every consideration being shown to the condemned; c) this case was much worse than other murder cases, and that this case was an extremely rare one in its severity and nature, and the accused was much worse than other people charged with murder; and d) that the jurors should fear Mr. Rodriguez escaping and committing other crimes. (v. 34, p. 110-11, 118, 182)

Mr. Rodriguez argued on appeal that the state's use of these factors in support of the death penalty, after Mr. Rodriguez was denied an opportunity to present evidence in mitigation to rebut them violated the Confrontation, Compulsory Process, Due Process, Trial by Jury and Cruel and Unusual Punishment Clauses.[2] The Colorado Supreme Court did not address those issues. The Court approved all of the state's arguments except that regarding a comparison of the case at bar with others, but it held that error harmless. *People v. Rodriguez*, 794 P.2d 965, 979 (Colo. 1990).

II. During the trial the state presented identification evidence from the victim's brother, plus testimony that Ms. Martelli cared daily for her sick mother. (v. 28, p. 46-52) The state presented testimony from her employer that she had just finished work on the day in question. (v. 24, p. 142-149) Her driver's license, bearing her birthdate, was also introduced into evidence. (Defendant's Exhibit 4).

During the penalty phase, Mr. Rodriguez filed a Motion in Limine to Define Parameters for Penalty Phase closing Argument, requesting that the state be precluded from arguing that sympathy for the victim should influence the jury's decision. (v.3, p. 680; Appendix 9). The trial court refused to give Mr. Rodriguez' tendered jury instructions providing that, "You must not be

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2. Partial Opening Brief at 32, 50-51, 62, 69 ; Partial Reply Brief at 2-23.

influenced by prejudice, bias or public opinion against Mr. Rodriguez. You must not be influenced by sympathy for the victim against Mr. Rodriguez," (v.3, p.704), or any similar instruction. The court refused to instruct the jury that it should not consider the arguments of counsel in making its decisions. (v.3, p. 687) The jury was instructed, on the contrary, that its verdict on life or death was solely up to its discretion. (Instruction No. 15,; v. 3, p. 772)

Consequently, the prosecution argued extensively that the jurors should base their decisions on their feelings of sympathy for the victim, based on her family life, her job, and that her birthday was the same day as the closing arguments. The prosecutors argued explicitly that the jurors should base their decision on their emotional feelings for the victim. (v. 34, p. 97 *et seq.*) The prosecutors argued explicitly that the jurors should consider what it would be like for them to be anally raped by the accused. The prosecutors argued extensively that the jury should consider the demands of the community and the family, and that the jurors should act as representatives of, and as the conscience of, the community. Defense counsel's objections were overruled and finally counsel was ordered to sit down and let the prosecutor finish his argument. (v.34, p.102) Two motions for mistrial based upon the state's arguments were denied. (v.34, p.126-127, 186).

In response to Mr. Rodriguez arguments on appeal,[3] the Colorado Supreme Court held that the prosecutor's arguments urging the jury to base its decision on sympathy for the victim, the jurors' emotional response to the victim, and as if the jurors were the victim, were proper. *People v. Rodriguez*, 794 P.2d 965, 974-76, 988 (Colo. 1990). The court held that it would have been error to instruct the jury **not** to base its decision on sympathy for the victim. 794 P.2d at 988. The court held that it was proper for the state to urge the

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3. Partial Opening Brief at 32, 108.

jury to act as the representatives of and conscience of the community. 794 P.2d at 977.

III. Only one instruction to the jury at the penalty phase concerned the question of whether or not the jurors had to unanimously agree on the existence of a mitigating factor before they could consider it. Instruction No. 21 provided, in pertinent part:

> *If in the first two steps of your deliberations you have made unanimous findings that the prosecution has proven beyond a reasonable doubt* that one or more aggravating factors exists and that no mitigating factors exist, *or that a mitigating factor exist*, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the aggravating factor or factors. (v.3, p.779; emphasis added)

The "second step" to which this instruction referred required the jury to decide whether any mitigating factors existed. Another instruction described it as follows, with no mention of the unanimity issue:

> INSTRUCTION NO. 15
> * * * * The second step in your deliberations is to decide whether any mitigating factors have been shown to exist.
> * * * * The third step in your deliberations involves a weighing of the specified aggravating factor or factors against any and all mitigating factors. . . . (v.3, p771-772)

No contradictory or inconsistent instructions were given. The jurors were separately instructed that they need not agree on the weight to be given any aggravating or mitigating factor in the weighing process. (Instruction No. 22; v.3, p.781) Mr. Rodriguez' many tendered instructions providing that the jurors' decisions as to whether or mitigating factors existed did not have to be unanimous were rejected by the trial court.[4]

The Colorado Supreme Court affirmed and held that the instructions as a

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4. Some of these refused instructions, found at v.3, p.699-703, 707 are in Appendix 7.

whole allowed the jurors to "consider" mitigating factors that they had not found to "exist." *People v. Rodriguez*, 794 P.2d 965, 980-82 (Colo. 1990).

IV. This case was a very highly publicized one. The jury demonstrated a high degree of case recognition, although trial began almost two years after Mr. Rodriguez' arrest. Mr. Rodriguez is Hispanic. The victim was a 54 year-old unmarried white woman.

The trial court refused to instruct the jury, as requested by Mr. Rodriguez, that it should not consider prejudice, bias or public opinion against Mr. Rodriguez at the penalty phase. (Tendered Instruction No. 19(a), v. 3, p. 704) The trial court refused to instruct the jurors that the arguments of the prosecutors should not be considered in arriving at their verdict. (Tendered Instruction No. 3, v. 3, p. 687).

The prosecutors argued at the penalty phase that the jury should return a death verdict acting, not as individuals according to their own moral assessment of the case, but as representatives of the community and as "the conscience of the community," and that the jurors should take into account the demands of the community for death. (v. 34) They argued that the community and the victim's family would not have a difficult time making its decision. The prosecutors argued that Mr. Rodriguez' apparent racial bias, evidenced by passages in letters he wrote in an effort to help his girlfriend arrange a deal with the prosecution, was a reason to return a death verdict. (v. 34, p. 110)[5] As noted below in No. VI and as discussed in Argument VI, the prosecutors argued that the jury could and should consider numerous other obviously improper criteria against the accused.

The jury was instructed that it's decision on life or death was in its "sole discretion" (Instruction No. 15; v.3, p.772) No other limitations or guidelines

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5. "The defendant is part of a gang down there and they don't like rats and they don't like blacks. The defendant calls them "niggers."

for the jury's discretion were provided.

Mr. Rodriguez raised the failure of the instructions to provide any limitations or guidance for the jury's discretion, and the failure of the trial court to prevent the jury from considering the many improper criteria potentially presented by this case, as violations of the Eighth, Fourteenth and Sixth Amendments, in the Colorado Supreme Court.[6] That Court held that giving the jury unlimited discretion at the penalty phase of a capital case was constitutional under the Eighth and Fourteenth Amendments. *People v. Rodriguez*, 794 P.2d 965, 986 (Colo. 1990). That court also held that there was no error in refusing to preclude the jury from considering bias, prejudice or public opinion.

V. The jury was instructed that one of the statutory aggravating factors the state relied upon was that provided in C.R.S. sec. 16-11-103 (g)(j): "The defendant committed the offense in an especially heinous, cruel or depraved fashion." (v.3, p.773) The trial court denied Mr. Rodriguez' motion under the Eighth and Fourteenth Amendments to strike the aggravating factor. (v.33, p.18-19)[7] The state relied heavily on this factor in its arguments. The jury found the factor to exist and relied upon it in returning its death verdict. (v.3, p.752, 753)

The Colorado Supreme Court admitted that the jury's consideration of this vague factor violated the Eighth Amendment under *Maynard v Cartwright*, 486 U.S. 356 (1988) and *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Court held that the jury's consideration of the factor was harmless error. *People v.*

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6. Partial Opening Brief at 72-79, 101-116; Partial Reply Brief at 2-32, 66.

7. The motion noted herein, titled "Motion to Strike Alleged Aggravating Factors," was one of the hundreds of court documents apparently lost or discarded by the trial court before the record on appeal was prepared. The state has stipulated that the copy in Appendix 1 to the Partial Opening Brief in Appendix 6 to this petition is an accurate copy of the motion.

Rodriguez, 794 P.2d 965, 982-984 (Colo. 1990). Three Justices dissented.

VI. Under Colorado law, C.R.S. § 16-11-103 (2), the jury is the sentencer in capital cases where there is a jury trial. Its decision is binding.

At the penalty phase of this case the jury was unambiguously instructed that Mr. Rodriguez "will receive a life sentence" on the two merged murder counts. (Instruction no. 25, v;3, p.784.)

The trial court and the prosecution also repeatedly informed the jury that any death verdict the jury returned was not binding on the trial court, which would ultimately decide whether death would be imposed. The court plainly instructed the jurors during *voir dire*, over objection, that the court would impose the sentence. (v.21, p.264)[8] In fact, the court instructed the jury in the same language which the Colorado Supreme Court had held, before and after *Caldwell v. Mississippi*, 472 U.S. 320 (1985), failed to inform the jury of the binding effects of their decisions. During *voir dire* the prosecution successfully objected when defense counsel attempted to inform the jurors that their decision was binding on the trial court. (v.23, p.29)

The jury was unambiguously informed in Instruction No. 23 that the final decision whether or not to impose death was the trial court's, even if the jury returned a death verdict. (v.3, p.782)[9] The court also repeatedly and over objection instructed the jury that its decision was only whether the accused "should" be sentenced to death, rather than that the jury's verdict was binding.

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8. "At the conclusion of the hearing the jury will determine whether certain statutory, aggravating factors have been proven beyond a reasonable doubt, and also the jury will determine whether any mitigating circumstances exist. *Depending on the determination of the jury, the court will enter a sentence of life imprisonment or impose the death penalty.*" (v. 21, p. 264; emphasis added.)

9. "The manner of inflicting the punishment of death in the State of Colorado is by the administration of lethal gas. You must *assume* that the penalty of death will be carried out *if imposed by the Court pursuant to the jury verdict.*" (v. 3, p. 782, emphasis added.)

The prosecution thus argued to the jury that the judge, not the jurors made the final decision on the death sentence, and that everyone at the prison knows that no one ever gets the death penalty. (v.34, p.122)

Mr. Rodriguez raised this issue on appeal[10] and the Colorado Supreme Court affirmed. *People v. Rodriguez*, 794 P.2d 965, 984-986 (Colo. 1990).

VII. The prosecutors engaged in as extensive and egregiously improper misconduct during closing arguments at the penalty phase of this capital case as has appeared in any recent published decision. Defense counsel filed a Motion in Limine regarding such misconduct before those arguments, (v. 3, p. 680) and he objected three times during those arguments before the trial court ordered him to sit down and allow the prosecution to finish its arguments, (v. 34, p. 102), ironically in response to an argument which the trial court had just ruled was obviously improper. (v. 34, p. 96)

The prosecution continued its misconduct thereafter, arguing such things as the jurors should consider their personal financial interest in killing the accused instead of supporting him in prison. *E.g.*, "Nobody wants to support this man for the rest of his life." (v.34, p.113, 118); that they should base their decision on emotion, not reason (v.34, p.182); that sympathy for the victim and the victim's family were aggravating factors (v.34, p.99, 109, 113, 170) ; that the jurors should decide the case as if they were the victim; "Can you imagine how disgusting it would be to be raped by this defendant? Can you imagine being anally raped by this defendant? I am not just talking to the women on this jury. I am talking to everybody on the jury." (v.34, p.110); that the demands of the community and the victim's family for the death penalty were aggravating factors (v.34, p.99, 113, 168-169, 173, 182); that the accused's apparent racism was an aggravating factor (v.34, p.110); that the accused would escape and

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10. Partial Opening Brief at 85.

terrorize the jurors and others, when there was absolutely no evidence to support that argument and the trial court had indeed granted a motion to prevent the state from making exactly those arguments (v.34, p.109, 112, 115, 116, 181-82); that prison was pleasant and had many amenities, and that the death penalty was quick, humanely inflicted, and that the condemned was given every consideration before he was killed, all of which arguments were totally without foundation in the evidence (v.34, p.118) ; that the accused would rape and kill inmates and guards if sentenced to prison, all of which was without factual foundation (v.34, p.116, 110); that the accused would influence other inmates who would get out, another argument lacking any basis in reality (v.34, p.119-20); that the Colorado Legislature, in its statutes, had already indicated that the accused deserved the death penalty (v.34, p.98) ; that this case was far worse than other first-degree murder cases, and the accused's background was much worse than others charged with that crime, making this case appropriate for the death penalty (v.34, p.102); that the accused was not human and therefor did not deserve to live (v.34, p.115, 125); that the accused was on a "leash on the streets of Denver" (v.34, p.121); that the jurors had the responsibility of keeping the streets of Denver safe (v.34, p.113-114) ; that the jury must enforce the death penalty as the "last fall back position of a free society," that "justice is out of whack," and "justice has been terribly, terribly offended." (v.34, p.183-84)

The prosecutors misstated the law in critical respects, for example asserting falsely that Mr. Rodriguez could be eligible for parole in twenty years if given a life sentence, when the court had already ruled that this was not to be the case, (v.34, p.113) and falsely that the prosecution had not been allowed an opportunity to cross-examine the mitigation witnesses and evidence. (v.34, p.173-74)

The prosecutors "testified" extensively about our "great" country, and

how, if people are honest and work hard, they do okay, (v.34, p.117), and Abe Lincoln, Babe Ruth, Martin Luther King, Medal of Honor winners, laws, opportunity and justice. (v.34, p.175-176) They also argued that 'hanging is not good enough' for the accused. (v.34, p.110-11)

VIII. *Hundreds* of court documents, exhibits, pleadings, jury instructions given and tendered, motions, Jury Commissioner documents and transcripts were not sent to the Colorado Supreme Court as part of the record on appeal in this case. The existing transcript is also manifestly deficient and defective in several important respects. For the most part, the missing materials have been lost or discarded by the trial court. The trial court refused to transmit a sealed transcript of a hearing on the competency of the accused to stand trial to the Supreme Court. Mr. Rodriguez' numerous efforts to obtain either a remand of this case to the trial court in order to correct the record, or a reversal of the sentence due to the grossly inadequate record, or other alternative relief, or even an extension of time within which to file the opening brief in the Colorado Supreme Court in because the record necessary to prepare many of the apparent issues on appeal, were all unsuccessful. That court denied all of Mr. Rodriguez' motions.

C. How the Federal Consitutional Issues Were Raised and Decided Below.

All of the arguments were explicitly raised to the Colorado Supreme Court in Mr. Rodriguez' Partial Opening Brief and Partial Reply Brief, and in the Petition for Rehearing in that court. That court's resolution of those issues is noted above. The motions and orders regarding the incomplete and inadequate record on appeal are included as Appendix 6 to this petition.

REASONS FOR GRANTING THE WRIT

I. THE DEATH SENTENCE IS UNRELIABLE BECAUSE IT IS BASED ON AGGRAVATING FACTORS WHICH THE ACCUSED WAS NOT ALLOWED TO REBUT OR CONFRONT WITH MITIGATING EVIDENCE, AND THE DECISION OF THE

COURT BELOW IS IRRECONCILABLE WITH THIS COURT'S DECISIONS SUCH AS *GARDNER V. FLORIDA*, 430 U.S. 349 (1977), *LOCKETT V. OHIO*, 438 U.S. 568 (1978), AND *SKIPPER V. SOUTH CAROLINA*, 476 U.S. 1 (1986).

Mr. Rodriguez was sentenced to death on the basis of aggravating circumstances which he had no opportunity to rebut or confront, and he was denied the opportunity to present evidence on what ultimately became extremely important mitigating considerations. The result is an unfair and unreliable death sentence which violates the Sixth, Eighth and Fourteenth Amendments. The Colorado Supreme Court refused to acknowledge, much less enforce, these bedrock principles.

In *Gardner v. Florida*, 430 U.S. 349 (1977), this court held that the Due Process Clause required that the accused in a capital case be provided an opportunity to confront and rebut material upon which the a death sentence might be based.[11] This court noted the now-axiomatic principles that "death is different," and the necessity that death sentences be and appear to be based on "reason rather than caprice or emotion." 430 U.S. at 357-58.

In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the majority of this court reversed a death sentence because the accused was not allowed to present evidence of his good conduct in jail as a mitigating factor, under the principles set forth in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *et al.* Three concurring Justices wrote that they would reverse on the basis of *Gardner*, since the prosecution argued that the accused's conduct in jail, *i.e.*, his probable "future dangerousness" in prison, was a reason to impose death, and the accused was not permitted to present his

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11. In that case, the material at issue was a presentence report which the sentencing judge and the Florida Supreme Court considered but to which the accused was denied access.

evidence to rebut those arguments.

Mr. Rodriguez announced before trial that he would **not** rely on the statutory mitigating factor that he would 'not pose a continuing threat to society' set forth in C.R.S. § 16-11-103 (5)(k). (v.2, p.386)[12] He later filed a Motion in Limine asking that the state be precluded from arguing that Mr. Rodriguez would escape from prison and commit other crimes. (v.3, p.680,682) Defense counsel informed the court that, if the court was not going to grant the motion in limine, he wished to present evidence he had available to rebut such assertions by the state. (v.34, p.4) The trial court stated that it considered such an argument by the state to be improper and granted the motion in limine. (v.34, p.5) Mr. Rodriguez thus did not present his evidence in mitigation and rebuttal since under the court's order there was no need for it. (Appendix 8 contains the motions and transcripts referred to here.)

Nevertheless, the state made extensive arguments on precisely that issue. It argued strenuously that Mr. Rodriguez would escape and commit other crimes, and that he should thus be sentenced to death.[13] The trial court did

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12. The statute provides as follows:
(5) For purposes of this section, mitigating factors shall be the following factors:
* * * *
(k) The defendant is not a continuing threat to society;

13. For example:

> [T]he woman was forceably sexually assaulted. She was tortured. This is what will continue to please Frank Rodriguez." (v. 34, p. 112)
>
> "The letters show this defendant has no intention of staying in jail. The defendant is waiting for his turn to get out."(v.34, p.115)

Defense counsel, risking contempt of court, objected. (v.34, p.115) The trial court refused to sustain the objection, but sustained it as to "further comments." (v.34, p.115-116)

> Ladies and gentlemen, there have been many, many, many lives touched and destroyed and ruined by this defendant, and the future could be like the past, a series of "don't take responsibility;

not enforce its order. Defense counsel was unable to object to most of these arguments due to the trial court's order, after his third objection, to allow the prosecutor to finish his argument. (v.34, p.102) The trial court overruled one of defense counsel's objection to the "fear of escape" major theme. (v. 34, p. 115) It sustained two others which involved other matters, all made risking contempt of court after the court's earlier order. (v.34, p.124, 116)

Further, Mr. Rodriguez moved before trial for leave to present evidence in mitigation on "[t]he cruel and unusual nature of the death penalty," and "the infliction of the death penalty through ex-workers (sic), prison guards, religious leaders, scholars, etc." (v.2, p.245; v.1, p.192, 198) This motion was denied. (v. 11, p.167) Mr. Rodriguez presented extensive written and transcriptual materials in support of his motion concerning the hideously painful nature of the cyanide poisoning used to kill in Colorado. He established that cyanide gas poisoning is neither fast nor "as humane as possible." (See v10,p112;

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blame others." Contact visits, always lurking in the shadows of the Department of Institutions somewhere will be Frank D. Rodriguez, lurking there; no finality; no finality for his family or for the Martelli family. He will always be lurking and waiting and conning, threatening, a shadowy figure of a defendant who kills by torture, who gets out and within a very, very short period of time he did these whole series of terrible crimes and now he is back.

He will be there advising others; being the big man, being a cell block captain, strutting around with his bragging rights, and he will be bragging to people how he will be right back out on the street, bragging to them. (v.34, p.181-182, emphasis added).

Read the letters, ladies and gentlemen; read them closely. The defendant says he going to be out with Margie; he will get out; he will marry Margie, or is it Tammy, or is Juanita he is going to marry? Do you have any doubt that he would assault and kill a prison guard if it served his purpose?(v.34, p.116)

It's widely perceived the women are so kind; they're too nurturing to do it, but we don't think that's true in this case. We think we have women on the jury who are strong; women who recognize the continuing threat to women and to other people that this defendant poses. (v.34, p.123-124)

Defendant's Exhibits 34, 35, 36, 37.)

The prosecution argued extensively that the infliction of the death penalty was humane, that every consideration would be allowed Mr. Rodriguez, and, indeed, that it was "too good" for him.[14]

Mr. Rodriguez also moved for leave to present evidence in mitigation concerning prison conditions should Mr. Rodriguez receive a life sentence. (v.1, p.192, 197-98) That request was denied. (v.11, p.167) Nevertheless, the state argued extensively to the jury concerning the easy life Mr. Rodriguez would have in prison. For example:

> If you sentence this defendant to life imprisonment, as a courtesy of the government this defendant will get free food for the rest of his life; three meals a day; not great food, but meals that meet the requirements of state and federal law.
>
> The defendant is going to get to sleep in a bed. There are T.V.'s in Canon City, color televisions. There are radios. You can follow the Broncos; you can exercise. There are books there or magazines. There are newspapers. You can get mail. You can send mail. You can have visits with friends; with your family. This defendant's younger brother, Christopher Rodriguez will be down at the penitentiary with him, maybe they will get to share a cell again. (v. 34, p. 118)
>
> He will be there advising others; being the big man, being a cell block captain, . . . (v.34, p.182)
>
> Given his conduct the defendant had to figure that he would end up back in prison, it was just a matter of time. Only this time the defendant will have his new status, because when you live among

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14.
Lorraine Martelli suffered a terrible and gruesome death. By comparison, Frank Rodriguez' death will be as humane as possible. He will not be physically tortured. He will not be raped. He will not have somebody smashing the glasses off his head. He will not be stabbed in the back or in the front or in the side the way he kept choking up Lorraine Martelli.
This is not an eye for an eye, ladies and gentlemen. We are far too civilized to society for that. This is far short of an eye for an eye. You have probably heard the expression that hanging is not enough for that man, but the law says it's enough so it's enough. The execution of Frank Rodriguez, if it comes about, will be performed humanly ladies and gentlemen.
The defendant will get to write letters to whoever he wants; he will get last visits with his family. He will get a last meal. He will get a chance to make peace if it's possible with the Lord. Death will be fast. (v. 34, p. 110-111)

hard-core criminals the most respected person is not the warden. The most respected person is the most notorious person. The most notorious for the crime they committed. (v.34, p.118-19)

Further, the trial court denied Mr. Rodriguez' motion for leave to present evidence in mitigation that the death penalty was being sought in a dispoprotionate manner against Mr. Rodriguez, since other cases as aggravated had not been prosecuted as death cases by the state, and in order to inform the jury of community standards. (v.1, p.165; v.2, p245, 247-48) The state was then permitted to argue over objection that the case at bar were far worse than other murder cases, and the accused thus especially deserved the death penalty.

MR. SILVERMAN [prosecutor]: It's a very rare combination of a crime and a defendant that satisfies so many of the statutory criteria.
MR. EISNER [defense counsel]: Objection, judge, to any comparison to this to other cases.
THE COURT: Overruled, * * * *
MR. SILVERMAN: This sort of conduct is rarely seen in Colorado, but we have seen it here; all sorts of things that make the crime worse than your average first degree murder. There are other things; this defendant's terribly extensive and violent background make him far worse than your typical cold-blooded killer. (v.34, p.110)

The Colorado Supreme Court held on a corollary issue that the state was permitted to argue "fear of escape" despite any supporting evidence, on the ground that the liklihood of escape was "common knowledge." 794 P.2d at 976. It approved or ignored the state's arguments regarding prison conditions and the pleasant nature of cyanide gas poisoning. 794 P.2d at 976-79. As such, that court implicitly acknowledged that the jury actually considered those assertions as fact-based reasons to impose death.[15]

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15. That court also held that the state's assertions did not introduce a non-statutory aggravating factor at all, in that the state was merely rebutting a mitigating factor that the state "correctly anticipated" the accused would argue.

> The argument that the defendant might some day escape from prison was not impermissible. It went to the issue of future dangerousness, and whether the defendant would pose a continuing threat to society, which the prosecutor correctly anticipated the defense would argue was a mitigating circumstance since the defendant would be in prison for life. It is a statutory mitigating factor that the defendant would not pose a continuing threat to society. §16-11-103(5)(k). The prosecutor's reference to future dangerousness, i.e., the absence of a statutory mitigating factor, did not inject a nonstatutory factor into the proceedings. *People v. Saathoff*, 790 P.2d 804, 806-07 (Colo. 1990) (evidence of the non-existence of statutory mitigating factor admissible i prosecution's case in chief in capital sentencing proceeding) . . . .

794 P.2d at 976.

The Colorado Supreme Court did not mention these issues, the denial of the motions to present mitigation evidence, the Motion in Limine or the trial court's granting of it, in its opinion. It upheld all of the states' arguments except the "proportionality" one, which it found to be harmless without mentioning Mr. Rodriguez' offer to present evidence on that issue. 794 P.2d at 977-979.

Lockett, *Eddings*, *Skipper*, *Gardner* and their progeny are dispositive of this case. Mr. Rodriguez was denied the right to present mitigating evidence.

Mr. Rodriguez was put in the same manifestly unfair positions as the

This assertion is unfounded.

This unique doctrine of preemptive rebuttal of matters not argued or supported by any contrary evidence is by itself a grossly unfair proposition. In this case, however, in light of Mr. Rodriguez' affirmative disavowal of reliance on the supposed mitigating factor and his failure to introduce his evidence on that point, in the absence of any jury instruction that rebuttal, not affirmative evidence of aggravation and reasons to return a death verdict, is what was occurring during the state's arguments, and in light of the state's use of the "fear of escape" and all of the other arguments as affirmative reasons for returning a death verdict, the doctrine is at best irrelevant.

The Court turns reality on its ear when it suggests that the prosecution "correctly anticipated" that Mr. Rodriguez would argue the statutory mitigating factor. Mr. Rodriguez affirmatively disavowed reliance on that factor and was obviously not attempting to employ it in the case. He filed his motion in limine to prevent the state from arguing what was not an issue, factually or legally, in the case. Only because the court granted his motion did he not affirmatively rebut the state's assertions. Defense counsel's extremely brief argument that Mr. Rodriguez would not be a continuing threat since he would be in prison, **after** the bulk of the state's extensive arguments, was obviously an attempt to counter the state's primary theme of "fear of escape."

defendants in *Gardner* and *Skipper* by the prosecution's extensive assertions that he would escape from prison and commit further crimes, after the trial court's explicit but ultimately unenforced order that it could not do so misled him into thinking that he had no need to present his evidence which would have negated the state's argument. As in *Gardner* and *Skipper*, Mr. Rodriguez was denied any opportunity to rebut or confront the state's assertions regarding "fear of escape" by the trial court's ignored and unenforced order that they could not be made. As in *Skipper* and many similar decisions, Mr. Rodriguez was effectively denied his right to present evidence which would support a life sentence rather than death. That he was unaware that "fear of escape" was a "legitimate" issue until closing arguments was purely a function of the trial court's order.

Rebuttal of aggravating factors will frequently be "mitigation" under *Lockett* and *Eddings*, since such evidence would present reasons to impose life imprisonment by negating reasons to impose death. However, under a statutory scheme like Colorado's,[16] it is likely that the accused will have no motive to present evidence which rebuts aggravating factors which the law, or an explicit court order, precluded the state from relying on. The motion to determine the propriety of the "fear of escape" arguments was prudent in light of the tendency of prosecutors to engage in misconduct during arguments. Yet Mr. Rodriguez was plainly misled by the trial court's ruling. When the state

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16. Under Colorado law at the time of trial, only "statutory" aggravating factors could be considered by the jury in its decision at a penalty phase. *People v. Rodriguez*, 794 P.2d 965, 976 (Colo. 1990); *People v. Davis*, 794 P.2d 159 (Colo. 1990); *People v. Tenneson and Vialpando*, 788 P.2d 786 (Colo. 1990); *People v. Saathoff*, 790 P.2d 804 (Colo. 1990). This interpretation of the statute, and the absence of any evidence to support such an argument were the explicit bases of Mr. Rodriguez' motion in limine to preclude the state from arguing "fear of escape" as a reason to impose death. The trial court obviously agreed.

argued what the trial court had ruled it could not, Mr. Rodriguez, like *Skipper*, was placed in the position of facing an aggravating factor for which he had no rebuttal in the eyes of the jurors, despite the existence of evidence to rebut it.

The Colorado Supreme Court has simply ignored those decisions. This court should thus grant certiorari and review and reverse the Colorado Supreme Court's affirmance of the death sentence.

II. THE COLORADO SUPREME COURT'S HOLDING THAT SYMPATHY FOR THE VICTIM AND HER FAMILY, THE JURORS' POSITIVE EMOTIONAL REACTION TO THE VICTIM, AND THE PURE EMOTION OF 'PUTTING THEMSELVES IN THE SHOES OF THE VICTIM,' ARE LEGITIMATE AGGRAVATING FACTORS IS DIRECTLY CONTRARY TO THIS COURT'S DECISIONS IN *BOOTH V. MARYLAND*, 482 U.S. 496 (1988), *SOUITH CAROLINA V GATHERS*, 490 U.S. ___, 104 L.ED.2D 867 (1989), AND *ZANT V. STEPHENS*, 462 U.S. 862 (1983), AND VIOLATE CONSTITUTIONAL STANDARDS.

The prosecution argued extensively at the penalty phase that sympathy for the victim and her family, based on matters irrelevant to the circumstances of the crime, whatever positive emotional responses the jurors had to the victim, and the juror's emotional response to the image of 'putting themselves in the shoes of the victim' and imagining being anally raped by the accused, were reasons to return a death verdict. Ms. Martelli's family was noticeably in attendance during the trial. They caused several disruptions of the proceedings. (v.24, p.154; v.34, p.97) Examples of the state's arguments, all approved by the Colorado Supreme Court, follow:

> Ladies and gentlemen, next Saturday will be Lorraine Martelli's birthday; her birthday. She won't be here to celebrate that birthday. Contrast Lorraine Martelli's fate with that of the defendant's, if you are to determine that he should spend a life sentence in the penitentiary.
>
> Lorraine Martelli will not ever be able to write letters to anyone, much less her blood family. Her family will never be able to write to her. She won't have a group of peers to hang out with. She won't even be able to go to work at the House of Glass. She will never see television again.
>
> Counsel for the defendant would like to dismiss these

thoughts because they don't serve the defendant well, because a jury thinking those types of thoughts might just start putting them in when you start to weigh those aggravating factors in making a just determination under the law, so let's dismiss those.

Let's just weigh that off; forget about Lorraine. This terrible thing is conceded; don't be emotional and don't be upset; don't be the conscience of the community; don't be a jury.

You know, as I look at you through my blood-shot eyes, I know this is not a jury of twelve computers, but twelve human beings who do have feelings about these things, and that's why we use citizens and not computers, and that's why that's okay, because justice is the product we manufacture in this courtroom, and that's what we're here for. (v.34, p.180-181)

Ladies and gentlemen, there have been many, many, many lives touched and destroyed and ruined by this defendant, and the future could be like the past, a series of "don't take responsibility; blame others." Contact visits, always lurking in the shadows of the Department of Institutions somewhere will be Frank D. Rodriguez, lurking there; no finality; no finality for his family or for the Martelli family. (v.34, p.181-182).

Obviously, this decision is a very important matter. It's important to everybody in this courtroom. It's important to nearly everybody in this community and it's important to you twelve people. (v.34, p.99) [Objection overruled.]

It's a difficult decision. I don't want to minimize it for you. It may not be a difficult decision for these people in the audience, but it is for you because-- (v34,p113) [Objection overruled.]

"She had no chance to say "good-by" to her loved ones and her loved ones had no chance to say "good-by" to her."(v34,p109)

The prosecution continued the theme; it quickly reminded the jury of "this interested audience." (v.34, p.170)

> The People submit there can be no doubt now, no doubt whatsoever that it was this defendant; it was this defendant who raped and brutalized the anus of Lorraine Martelli. Can you imagine how disgusting it would be to be raped by this defendant? Can you imagine being anally raped by this defendant?
>
> I am not just talking to the women on this jury. I am talking to everybody on the jury.(v.34, p.110)

The jury was instructed that its decision on life or death was "solely in your discretion." (Instruction No. 15; v.3, p.772)

The Colorado Supreme Court rejected Mr. Rodriguez' argument that the

state's arguments violated the Sixth, Eighth, Fourteenth Amendments and this court's decisions in *Booth v Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S.___, 104 L.Ed.2d 867 (1989), and this court's holdings that any death sentence must be, and appear to be, based on reason rather than emotion or caprice. *E.g., Zant v. Stephens*, 462 U.S. 862 (1983); *Gardner v. Florida*, 430 U.S. 349 (1977). *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990). It held that sympathy for the victim and her family, based on matters which were in fact unknown to the accused and/or which were otherwise not directly related to the crime, were legitimate reasons for imposing death. 794 P.2d at 976. That court also held that the direct arguments that the jury could and should base its decision on emotion and sympathy for the victim was not error, stating that the jury would not have interpreted those appeals "in a manner contrary to the trial court's instructions or in violation of their duty as jurors." 794 P.2d at 979. The court did not address the remaining instances of emotional and sympathetic appeals except to state that they did not "warrant reversal." 794 P.2d at 979. That court held that, far from being improper, **it would have been error to have precluded the jury from considering sympathy for the victim** as a reason to return a death verdict. 794 P.2d at 988. In doing so, the court referred to its holding approving of the so-called "golden rule" argument. That argument is designed to evoke an emotional, sympathetic reaction, as the Colorado court acknowledged. Urging the jurors to themselves "imagine being anally raped" by the accused is quite different than urging the jurors to consider the plight of the victim based on the facts of the case. Thus, in the view of the Colorado Supreme Court, emotion, not reason or evidence, can constitutionally control the decisions against the accused in a capitial case.

That court distinguished *Booth* and *Gathers* on the specious ground that

in those cases the sympathy-invoking materials were unknown to the accused, whereas here the accused heard testimony from a family member and employer at trial, and saw the driver's license put into evidence, apparently putting him on "notice" of their existence. 794 P.2d at 975-976. Thus, since a member of the victim's family and the victim's employer testified during trial, and the driver's license was in evidence, Mr. Rodriguez was "aware" of those matters and the state was free to invoke any symathy-invoking image of family, job, birthday, etc., as a reason to impose death.

These distinction are made of whole cloth. This court's decision in *Booth* is dispositive, and the attempted distinction **actually** made by the Colorado Supreme Court is the distinction this court rejected in *Gathers*, by a different name. Mr. Rodriguez' awareness of the characteristics of the victim, her family relationships, her job, and her social worth in general **based completely on the state's evidence at trial** is no distinction at all.

In *Gathers* this court reaffirmed its holding in *Booth* that a person should not be sentenced to death based on the personal characteristics of the victim or the impact of the crime on the victim's family, something which unquestionably occurred here, because such things are irrelevant to the moral culpability of the accused. The state attempted to bring its case within the unanswered question in *Booth*: "the possibility that the kind of information contained in the victim impact statement could be admissible if it 'relate[d] directly to the circumstances of the crime.'" *Gathers*, 104 L.Ed.2d at 883, *quoting Booth v Maryland*, 482 U.S. at 507, n. 10. In *Gathers* the state contended that it was permitted to evoke sympathy for the deceased and against the accused based on the prayer card and voter registration card carried by the victim because they had been presented into evidence at trial, and thus they related to the "circumstances of the crime."

This court rejected that argument because the existence of the draft card and prayer card were "purely fortuitous, and cannot provide any information relevant to the defendant's moral culpability." 104 L.Ed.2d at 883. Such was the case in Mr. Rodriguez' case, where there was no evidence whatsoever that Mr. Rodriguez was aware of Ms. Martelli's family, birthday, job, etc.

The state's arguments here actually exceed anything presented in *Booth* or *Gathers*, so the attempt to distinguish them on the basis of the distinction attempted in *Gathers* would fail in any case. The Colorado Supreme Court's holdings, though not addressing many of the issues presented by this case, reflect a manifest failure to follow this court's precedents and basic Eighth Amendment and Due Process principles.

The state argued **directly** that the jurors' decisions should be based on emotion, and on their emotional responses to the victim and the offense. The Colorado Supreme Court held that such arguments are proper; emotion and sympathy are legitimate reasons to impose the death penalty. 794 P.2d at 974-977. These holdings depart radically from this court's holdings that life or death decisions should be based on reason, not emotion, *Gardner*, *Zant v. Stephens*, *Booth*, and this court should grant certiorari and review them.

The Colorado Supreme Court approved of the so-called "golden rule" argument by the state, 794 P.2d at 973-974, while acknowledging that it was intended to influence the jurors by evoking sympathy for the victim. 794 P.2d at 987-88.

The state argued directly that the jurors should base their decision on the demands of the community and that the jurors should act as representatives of the community, rather than exercise their own moral judgements.[17]

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17. In addition to those arguments noted above:

"So ladies and gentlemen, there is a certain problem here. See,

The Colorado Supreme Court held that such arguments are proper; the demands and wishes of the community are legitimate reasons to impose the death penalty. The jury **should** act as representatives of the community and decide the case as the community wishes. 794 P.2d at 974-977. That court cited *Booth* as authority for that proposition. These holdings are unjustifiable and radical departures from, and distortions of, this court's precedents, and this court should grant certiorari and review them.

III. THE SENTENCING JURY WAS INSTRUCTED THAT ANY DECISION THAT A MITIGATING FACTOR EXISTED HAD TO BE UNANIMOUS, AND THE DECISION OF THE STATE COURT IS THUS IRRECONCILABLE WITH THIS COURT'S DECISIONS IN *MCKOY V. NORTH CAROLINA*, ___ U.S. ___, 108 L.ED.2D 369 (1990), AND *MILLS V. MARYLAND*, 486 U.S. 367 (1988).

In *McKoy v. North Carolina*, ___ U.S. ___, 108 L.Ed.2d 369 (1990), and *Mills v. Maryland*, 486 U.S. 367 (1988), this court held that the Eighth Amendment precludes a state from requiring the sentencing jurors in a capital

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justice has been terribly, terribly offended; justice is out of whack." (v. 34, p. 183)

"Ladies and gentlemen, there is something out of whack here, it if goes on the credit card. If this jury and juries won't enforce that last fall-back position of free society-- [Objection overruled]. (v. 34, p. 185)

MR. SILVERMAN: As you can all plainly see, I have a big, blue book in my hand. . . . In it are the criminal laws, the criminal statutes, the criminal rules of this state; the state we all live in. This is the law of the State of Colorado.

Inside this book on page 140 is a statute; a law passed by our elected officials. That makes clear that it provides for the death penalty. Colorado has the death penalty. The instructions the judge just read to you come from this book here. . . . Don't make up your own rules; go by the book; go by this book right here.

If you do that you will see that on page 140 it is this defendant that is exactly the sort of person they're talking about as being appropriate for the death penalty.(v.34, p.98, emphasis added.)

You weren't elected by your community to come down here; you were drafted. (v.34, p.168-169)

case to unanimously agree on the existence of mitigating factors. Mr. Rodriguez was denied his rights under the Eighth and Fourteenth Amendments on those grounds.

After refusing to instruct the jurors that they should individually decide upon the existence of mitigating factors, (Tendered Instructions Nos. 17 (a) through (e), 21, 25; v.3, p.699-709), and without giving any other instruction on the issue of whether or not the jurors had to unanimously agree on the existence of mitigating factors, the trial court in Mr. Rodriguez' case gave Instruction No. 21:

> *If in the first two steps of your deliberations you have made unanimous findings that the prosecution has proven beyond a reasonable doubt* that one or more aggravating factors exists and that no mitigating factors exist, *or that a mitigating factor exist*, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the aggravating factor or factors. (v.3, p.779; emphasis added)

The "second step" of the jury's deliberations required the jury to decide whether any mitigating factors existed. Another instruction described it as follows, with no mention of the unanimity issue:

INSTRUCTION NO. 15

> * * * * The second step in your deliberations is to decide whether any mitigating factors have been shown to exist.
> * * * * The third step in your deliberations involves a weighing of the specified aggravating factor or factors against any and all mitigating factors. . . . (v.3, p771-772)

No instruction inconsistent or contrary to No. 21 on this point was given, and no other instruction addressed the issue. The trial court's intention to require unanimity is clear from its consistent refusal of give any instruction which stated the opposite.

This instruction requiring the jurors to unanimously agree on the

existence of mitigating factors violated the Eighth and Fourteenth Amendments. The failure of the Colorado courts to abide by those principles, as the North Carolina courts refused to before *McKoy*, is compelling cause for this court to grant the writ.

The majority of the Colorado Supreme Court held that this instruction did not violate the principle of *Mills* or *McKoy* because the jurors were not "affirmatively" precluded from "considering" or "giving effect to" mitigating factors which they did not unanimously "find to exist." The Court relied upon *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1197 (1990), to the effect that "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The Court determined that the jurors would necessarily have concluded that they had to "consider" mitigating factors even though they had been instructed that those factors did not "exist" unless unanimously agreed upon. *People v. Rodriguez*, 794 P.2d 965, 980-84 (Colo. 1990). The distinction between the unanimous decision that a mitigating factor existed and the individual juror's ability to consider that mitigating factor, nowhere made in the other jury instructions, is simply illusory. As dissenting Justice Lohr noted:

> These conclusory statements ignore the defendant's contention that instruction no. 21 may be interpreted to impose such a unanimity requirement.
>
> 794 P.2d at 1003.

The Supreme Court did not dispute that Instruction No. 21 was designed to, and in substance did, require unanimous decisions on the "existence" of mitigating factors. It charitably described the instruction as "at worst,. . . ambiguous." 794 P.2d at 980.

The distinction employed in this case is substantially similar to one drawn

by the North Carolina Supreme Court in *McKoy*[18], and fails for additional reasons. The alleged distinction does not logically exist. Even if it could exist, it simply was not made for the jurors in this case.

If the suggested distinction had existed in their instructions, there would have been no reason for the jurors to unanimously decide whether or not mitigating circumstances "existed" in the first place; the entire "second step" of their deliberations would be irrelevant to the process and outcome. The step of unanimously determining the "existence" of mitigating factors was, under the reasoning of the Colorado Supreme Court, a superfluous action, since whether or not the jurors had found any mitigating factors to "exist" was irrelevant to the jury's remaining tasks and decisions. It would be nonsense, and thus an extremely unlikely reading of the instructions, for such a bizarre procedure to have been presented to the jurors.

Consequently, the proposition that there was no reasonable likelihood that any juror would have read these instructions as the trial court intended them to be read, and thus no reasonable likelihood that any jurors felt that the only mitigating factors they could decide what weight to give to, and weigh against the aggravating factors, and consider in the final decision as to a verdict, were those which the court had informed them they should decide the existence of on a unanimous basis, is contrary to reality and common sense.

Further, no instruction to the jury suggested the distinction relied upon by the Colorado Supreme Court.

The Court referred to various instructions which informed the jury, more or less clearly, about the issue of unanimity **as to other decisions the jurors were called upon to make**. For example, the jury was instructed that they

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18. *I.e.*, that the jury can "consider" the mitigation when deciding whether it exists or not. 108 L.Ed.2d at 380-81.

could individually decide on the "weight" to give each mitigating factor that they had [unanimously] found to exist. 794 P.2d at 982. (v.3, p. 699- 702, 707)[19] In a *non sequitur*, the court simply concluded that there was no reasonable likelihood that any juror would have thought s/he was required to unanimously agree on the mitigators they "considered."

In fact, that other instructions so clearly stated what decisions the jurors should individually, as opposed to unanimously, make, has quite the opposite logical effect than that given by the Colorado court. The jury would look all the more for such a specific instruction from the trial court, directing it to decide upon the existence of mitigating factors individually, not unanimously. As Justice Lohr noted:

> Instruction no. 21 could be interpreted by a reasonable juror to mean that only those mitigators unanimously found to exist in step two remain in consideration during the weighing process of step three. The various statements in the instructions that the jurors need not agree upon the *weight* they assign to particular mitigating factors do not contradict this interpretation.

794 P.2d at 1003.

The failure of the Colorado Supreme Court to follow this court's precedents, and it significant misapplication of *Boyde v. California*, merits granting of the writ.

IV. THE STATE COURT'S DECISION THAT THE SENTENCING JURY IN A CAPITAL CASE CAN CONSTITUTIONALLY BE GIVEN UNLIMITED, UNGUIDED DISCRETION TO CONSIDER ANY CRITERIA OR FACTOR AGAINST THE ACCUSED, INCLUDING SUCH THINGS AS BIAS, PREJUDICE AND PUBLIC OPINION, THE RACES OF THE ACCUSED AND OF THE VICTIM, THE DEMANDS OF THE COMMUNITY AND THE VICTIM'S FAMILY FOR DEATH, THE ACCUSED'S RACIST ATTITUDES, SYMPATHY FOR THE VICTIM AND HER FAMILY, IS IRRECONCILABLE WITH THIS COURT'S DECISIONS SUCH AS *FURMAN V. GEORGIA*, 408 U.S. 238 (1972) AND *ZANT V. STEPHENS*, 462 U.S. 862 (1983) AND THE EIGHTH, FOURTEENTH AND SIXTH AMENDMENTS.

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19. Many of the instructions tendered by Mr. Rodriguez, including No. 22, and the state were not preserved by the trial court and are not formally part of the record on appeal. The state has stipulated that Mr. Rodriguez tendered an instruction identical to No. 22.

In *Zant v. Stephens*, 462 U.S. 862 (1983), this court noted that, while a state could constitutionally allow the sentencing jury to consider a wide range of information about the character and background of the accused as reasons for a death sentence, it could not permit the jury to consider constitutionally protected or irrelevant conduct against the accused.

> In analyzing this contention [that the submission of an invalid aggravating factor impaired the death sentence] it is essential to keep in mind the sense in which it is "invalid." It is not invalid because it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected. Georgia has not, for example, sought to characterize the display of a red flag, cf. Stromberg v. California, the expression of unpopular political views, cf. Terminiello v. Chicago, 337 U.S. 1 (1949), or the request for a trial by jury, cf. United States v. Jackson, 390 U.S. 50 (1969), as an aggravating circumstance. Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. Herndon v. Lowry, 301 U.S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental status. Cf. Miller v. Florida, 373 So.2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

Zant v. Stephens, 462 U.S. at 885.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), this court rejected the state's attempt to justify the use of a constitutionally invalid conviction as a basis for a death sentence and reaffirmed what it had said in *Stephens*:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. See

> Gardner v. Florida, 430 U.S. 349 363-364, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976)) (White, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 884-885, 887, n. 24, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983).

Johnson v. Mississippi, 486 U.S. at 584-85.

In Mr. Rodriguez' trial, the court gave the following instructions to the jury regarding its final decision whether to return a death verdict:

> INSTRUCTION NO. 1
>
> Members of the jury, the evidence in this penalty phase hearing has been completed. In a moment I will read you the law which you must apply in order to reach your sentencing decision . . . . During the course of the trial and penalty phase you received all of the evidence that you may properly consider to decide the case. Your decision must be made by applying the rules of law which I give you to the evidence presented.
>
> It is your duty first to determine the facts from the evidence that you have heard during the first trial on guilt or innocence was well as the additional evidence presented during the penalty phase hearing. then you are to evaluate those facts in light of the requirements set forth in these instructions.[20]
>
> INSTRUCTION NO. 15
>
> * * * * Colorado law allows the death penalty only if the prosecution, in addition to proving Murder in the First Degree, also proves beyond a reasonable doubt that:
>
> 1. * * * *
> 2. * * * *
> 3. * * * *
> 4. That death is the appropriate punishment in this case.
>
> You must therefor deliberate in a series of steps.
>
> * * * *
>
> *The fourth step in you deliberations is to decide whether the defendant should be sentenced to death or life imprisonment. This decision is solely in your discretion.* (v.3, p.771-772; emphasis added.)
>
> INSTRUCTION NO. 21
>
> * * * *3. If all jurors unanimously agree that there are no mitigating factors or there are not sufficient mitigating factors that outweigh the aggravating factors found to exist, then the jury shall determine if death is the appropriate punishment in this case. (v.3, p.780)

In Instruction No. 21, the jury was also instructed to base its decision as to the weighing of aggravating and mitigating circumstances on "the totality of the circumstances present."

On the other hand, the court refused to preclude the jurors from considering bias prejudice or public opinion against Mr. Rodriguez, or sympathy for the victim, and it rejected Mr. Rodriguez' tendered instruction on that point. The court refused to instruct the jury, in accordance with the Colorado standard jury instructions, COLJI Crim. 1:03, that the arguments of the prosecutors should not be considered in making their decisions.

As discussed below, the trial court submitted to the jury the unconstitutionally vague "especially heinous, cruel or depraved," statutory aggravating factor set forth in C.R.S. § 16-11-103 (6)(j). (v.3, p.773)

In *Maynard v Cartwright*, 486 U.S. 356 (1988), this court reaffirmed *Godfrey v. Georgia*, 446 U.S. 420 (1980) and found that Oklahoma's "especially heinous, atrocious and cruel" statutory aggravating factor was unconstitutionally vague and overbroad under the Eighth Amendment. This court noted that the vague factor allowed the jurors "open-ended discretion" to consider any arbitrary and capricious criteria in its decisions, thus violating the principles underlying *Furman v. Georgia*, 408 U.S. 238 (1972). 486 U.S. 361-64.

In this case the jury was both permitted and encouraged to consider the arbitrary, capricious, constitutionally irrelevant and impermissible matters which this court has held a jury may not. The state argued such matters, there was ample evidence that, if a juror so desired, could be used to create adverse

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20. The Colorado Supreme Court held that this instruction prevented the jurors from carrying over the instructions on the first phase to the sentencing phase. *People v. Rodriguez*, 794 P.2d 965, 989 (Colo. 1990). It also held elsewhere that the jury was entitled to consider and rely on various aggravating matters **not in evidence**. *E.g.*, 794 P.2d at 973-979.

but constitutionally-impermissible inferences against Mr. Rodriguez, and, under the "especially heinous" aggravating factor, most certainly was considerable by the jurors. The death sentence is thus both unreliable and tainted. The Colorado Supreme Court's refusal to follow this court's precedents and its decisions in manifest contradiction to this court's decisions merits granting the writ.

For example:

The evidence revealed that Mr. Rodriguez is Hispanic, and Ms. Martelli was white. **Nothing** in the jury instructions prevented the jury from considering those "facts" as reasons to return a death verdict.

The case generated enormous publicity, as evidenced by the expanded media coverage, and the fact that most jurors were exposed to the publicity. The prosecution argued both explicitly and inferentially that the jury should consider public opinion, i.e., the demands of the community, against Mr. Rodriguez.[21]

The Colorado Supreme Court approved some of these arguments, saying that the jury was entitled to act as "representatives of the community" and as

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21. *E.g.*: "You know, we all want the streets of Denver to be safe. I asked jurors during voir dire their thoughts of the City and Denver and by in- large, people like it here; people want to be able to live here,; peole want the streets of Denver to be safe. This is not Lebenon." (v34,p103-104)

"If this jury and juries won't enforce that last fall-back position of free society--" (v.34, p.183-184)

"Obviously, this decision is a very important matter. It's important to everybody in this courtroom. It's important to nearly everybody in this community and it's important to you twelve people." (v.34, p.99)

For two years now everything has been coming down to this moment of truth; ***this moment when the citizens of this state take over.*** (v.34, p. 169, emphasis added.)

"It's a difficult decision. I don't want to minimize it for you. It may not be a difficult decision for these people in the audience, but it is for you because--" (v.34, p. 113)

"Reasons developed during that phase that would cause citizens and jurors to say, "no, no, he is not going to get away with it." (v.34, p.173)

"the conscience of the community." 794 P.2d at 977, *citing Booth v. Maryland*, 482 U.S. 496 (1987). As to others, the court simply stated that it did not find that the jurors would have interpreted the arguments contrary to their duties as jurors. *People v. Rodriguez*, 794 P.2d 965, 979 (Colo. 1990).

This is a plea for, and sanction of, jurors abandoning their own moral judgments and principles, based on the evidence and constitutionally necessary limitations on the considerable criteria, in favor of the demands of the community for, *i.e.*, public opinion in favor of, the death penalty. Having jurors overtly act as "representatives of the community" or as "the conscience of the community" is much different than a recognition that jurors acting on the basis of their own moral principles, on the basis of the evidence and applicable legal standards, "represent" the "conscience of the community." The Colorado Supreme Court's reliance upon this court's axiomatic statements in *Booth* is a distortion of those principles, which merits granting of the writ.

Nothing in any instruction prevented the jurors from considering the public opinion, prejudice or bias which the jurors may have felt the community felt. Nothing in any instruction prevented them from mirroring the bias and prejudice which underlay the public opinion of "the community." It is inconceivable that a death sentence may permissibly be based on such factors.

The state also argued that Mr. Rodriguez' own expressions of race prejudice, presented in evidence in the context of letters he wrote in his attempt to help his girlfriend strike a deal with the prosecution, were aggravating circumstances. (v.34, p.110)[22] Nothing in any instruction prevented the jurors from considering these constitutionally-protected, if unseemly feelings as reasons to return a death verdict. The Colorado Supreme

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22. The defendant is part of a gang down there and they don't like rats and they don't like blacks. The defendant calls them "niggers."

Court did not address these arguments. 794 P.2d at 979.

As noted above, the state argued extensively that sympathy for the victim, based on matters not directly relevant to the circumstances of the crime and unknown to the accused at the time, was an aggravating circumstance. The Colorado Supreme Court approved the arguments and held that it would have been error for the court to have instructed the jury not to consider sympathy for the victim. 794 P.2d at 990.

There are numerous other instances of "evidence" and prosecutorial arguments which involve constitutionally impermissible matters which in this case the jury was allowed to and often encouraged to consider in its decision on the death verdict. *E.g.*, Mr. Rodriguez' personal appearance, his simultaneous romantic relationships with at least two unmarried mothers

The death sentence in this case is unreliable and consitutionally-tainted because of the jury's consideration of such matters in its decision, the trial court's refusal to make any effort to prevent the jurors from doing so, and the state's repeated urgings to the jury to consider such matters. The Colorado Supreme Court has ignored this court's pronouncements and the basic principles of due process and Eighth Amendment jurisprudence, and has indeed turned them on their head. This court should thus grant the writ.

Mr. Rodriguez was similarly denied a fair trial by impartial jury and due process of law, U.S. Const., amend. XIV; because the jurors were permitted to consider any arbitrary, irrelevant, inflammatory factor they wished in making their final decision. *See Johnson v. Mississippi*, 486 U.S. 578 (1988); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1947); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *People v. Janke*, 720 P.2d 613, 616 (Colo. App. 1986) (... consideration

of the trauma to victims caused by their having to testify is not a proper basis for imposition of a sentence ... "); *People v. Short*, 66 Ill. App.3d 172, 383 N.E.2d 723 (1978) (trial court's consideration of public opinion in sentencing improper).

Further, "due process of law" means, at a minimum, that the state comply with the statutory requirements for punishing by killing. The jury instructions in this case radically altered the task the jury should have had to perform under the statute. Thus, there was no "due process of law."

V. THE STATE COURT'S HOLDING OF "HARMLESS ERROR" IN THE SENTENCING JURY'S CONSIDERATION OF THE "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED" AGGRAVATING FACTOR REPRESENTS A SIGNIFICANT MISAPPLICATION OF *MAYNARD V. CARTWRIGHT*, 486 U.S. 356 (1988) AND *CLEMONS V. MISSISSIPPI*, __U.S.__, 108 L.Ed.2d 725 (1990), AND THUS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Over objection the trial court submitted the aggravating factor defined in C.R.S. § 16-11-103 (6)(j): "The defendant committed the offense in an especially heinous, cruel or depraved manner," to the jury in this case. The jury was instructed in the language of the statute, (Instruction No. 16, v.3, p.773) and it returned a finding of that factor. (v.3, p.752) The prosecution made extensive arguments regarding this aggravating factor. (v.34, p.108, 109-113, 123, 125, 170, 173, 176, 178-78)

The Colorado Supreme Court agreed that the submission of this aggravating factor violated the Eighth Amendment under *Maynard v. Cartwright*, 486 U.S. 356 (1988). *People v. Rodriguez*, 794 P.2d 965, 982-983, 998, 1000-1001, 1005 (Colo. 1990); Four members of the court held this error harmless, citing *Clemons v. Mississippi*, __U.S.__, 108 L.Ed.2d 725 (1990). 794 P.2d at 983-84. Three Justices dissented.

In Colorado the sentencing jury is supposed to "weigh" the statutorily-prescribed aggravating factors against the mitigating factors. No written or other findings are required as to mitigation; there is no way of knowing what the jury found was mitigation or what weight it gave any factor. Only if the state proves beyond a reasonable doubt that mitigation does not outweigh the aggravation, does the jury go on to consider **only** the same statutory aggravating factors and all mitigation and decide whether the state has proven beyond a reasonable doubt that death is the appropriate punishment. *People v. Tenneson and Vialpando*, 788 P.2d 786 (Colo. 1990); *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990); *People v. Davis*, 794 P.2d 159 (Colo. 1990).[23] Thus, the jury here used the invalid aggravating factor in both the weighing and "appropriateness" stages.

In *Maynard v Cartwright*, 486 U.S. 356 (1988), this court reaffirmed *Godfrey v. Georgia*, 446 U.S. 420 (1980), and found that Oklahoma's "especially heinous, atrocious and cruel" statutory aggravating factor was unconstitutionally vague under the Eighth Amendment. That holding applies in this case, as the court below held.

In *Clemons v. Mississippi*, this court held that the submission of an invalid "especially heinous" factor to the sentencer in a state, like Colorado, where the jury is directed to "weigh" the aggravating factors against the mitigation, could be "harmless error" under *Chapman v. California*, 386 U.S. 18 (1966). This court held that the federal constitution did not preclude an appellate court re-weighing the aggravating and mitigating factors and concluding independently that the death penalty was appropriate. This court went on to hold that the Mississippi court could, under *Barclay v. Florida*, 463

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23. The jury was not instructed according to this scheme in this case.

U.S. 939 (1983) and *Satterwhite v. Texas*, 486 U.S. 249 (1988), find that the error was harmless without "re-weighing" the various evidence. This court stated that it agreed that the Mississippi court could properly find that the jury would have arrived at the same result had it not considered the invalid factor, 108 L.Ed.2d at 741, although it was both unclear whether it did so and extremely unlikely that such a conclusion would stand. This court continued that the Mississippi court could have meant that,

> "the result would have been the same had the especially heinous aggravating circumstance been properly defined in the jury instructions; and perhaps on this basis it could have determined that the failure to instruct was harmless.

108 L.Ed.2d at 743.

This court remanded the cause for a determination of whether such harmless error analysis was what the court actually performed. *Id.*

In Mr. Rodriguez' case, the Colorado Supreme Court manifestly misconstrued and misapplied that decision. In *People v. Davis*, 794 P.2d 159 (Colo. 1990), in which the court first addressed this issue and the upon which it relied in Mr. Rodriguez' case, it stated its reading of *Clemons* as follows:

> Under *Clemons*, when a jury has improperly considered as aggravator in determining whether death is the appropriate sentence, an appellate court has three options. First, it may "re-weigh" the aggravators and mitigators and determine whether death is appropriate. Second, it may apply "harmless error" analysis by considering whether, if the jury had not considered the invalid aggravator, it nonetheless would have sentenced the defendant to death. Finally, where the aggravator considered by the jury was improper because it was not given a constitutionally narrow construction, the reviewing court may apply another form of "harmless error" analysis and uphold the sentence if it finds, beyond a reasonable doubt, that had the aggravator properly been narrowed the jury would have returned a verdict of death. In this case, we elect to proceed under the third approach.

794 P.2d at 179.

Here, as in that case, the court reasoned that under the evidence

presented the jury would have found that the aggravating factor existed had it been given the "limiting" definition adopted for the first time in that case, namely: the defendant committed the crime in a 'conscienceless or pitiless' manner which was "unnecessarily torturous to the victim'" 794 P.2d at 983-983, 176-77. "*Thus*, the trial court's failure to instruct the jury on the definition of those terms was harmless error." *Id.*, at 180. The court also held that the result would have been the same without the factor. 794 P.2d at 984. The court did not "re-weigh" the aggravating and mitigating factors in either case. It reasoned that:

1) No evidence was introduced under the aggravating factor that would not otherwise have been admissible. This conclusion, however true, is meaningless, since the jury was permitted to consider a multitude of improper, irrelevant, unconstitutional factors under the label of this aggravating factor. For example, the jury was entitled to conclude that the fact that Mr. Rodriguez was Hispanic, or ugly, or skinny, or had racist attitudes, or that the victim was white, or that the public demanded the death penalty, all matters before the jury, made the offense more "depraved," "heinous," or "cruel." Such was the plain import of *Godfrey* and *Cartwright* and their reliance on *Furman v. Georgia*, 408 U.S. 238 (1972). The court's reliance on this irrelevancy, while ignoring the substance of the error introduced by the jury's consideration of the invalid factor, invalidates that court's "harmless error" analysis.

2) The jury found five other aggravating factors which were supported by overwhelming evidence. The court's failure to consider the nature of the other aggravating factors or **any** of the mitigation is contrary to this court's holding in *Clemons* and invalidates its reasoning and holding.

As the dissents note, two of these aggravating factors were at best identical. The jury found that the defendant intentionally killed someone he or

his confederates had kidnaped under C.R.S. § 16-11-103 (6)(d), and that he had intentionally killed someone during the course of a class 1, 2, or 3, felony, namely kidnapping, under C.R.S. § 16-11-103 (6)(g). First-degree murder is a class 1 felony in Colorado. C.R.S. § 18-3-102, so under the Paragraph (6)(g) factor, every intentional first-degree murder is "death eligible." Further, the other aggravating factors included the killing of a witness to the crime under C.R.S. § 16-11-103 (6)(l), which, like the (6)(g) factor, exists in every first-degree murder case.

Further, the court's failure to consider mitigation invalidates the court's harmless error analysis. *Clemons*, 108 L.Ed.2d at 740.

3) defense counsel "conceded" during arguments to the jury that the state had proven the *undefined, unconstitutional* factor. 794 P.2d at 983-84. This is unfounded. Defense counsel only acknowledged, after the trial court refused to strike or limit the scope of the factor, what this court held in *Cartwright* and *Godfrey* was a constitutional truism: "[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" 100 L.Ed.2d at 382. There was no imaginable means of, or use to, arguing that the state had not proven what exists in every murder case. The Court's reliance on this factor invalidates its harmless error holding.

The majority also asserted that the state had not stressed the invalid factor to the jury; the three dissenters contested this to the extent that the majority ultimately found that the error would have been harmless even had the state stressed the invalid factor to the jury. *Id.*, at 984.

The "harmless error" finding involving the new definition of the invalid factor is unfounded under *Cartwright*. It is nothing but an assertion that the facts of this case are so aggravated that the jury would have invariably arrived at the conclusion that the aggravator existed, under any definition. As

explained above and below, it also ignores the very reasons the vague factor is invalid. The same argument was rejected in that case as a ground for finding that, had the jury been correctly instructed on a constitutional limiting definition for the factor, the result would have been the same. *Maynard v Cartwright*, 486 U.S. at 364.

In *Clemons* this court did not indicate approval of the "substitution" harmless error analysis engaged in here, for good reason. It cannot work. The error caused by the consideration of the vague and overbroad aggravating factor is the jury's ability to consider any arbitrary or capricious reason for returning a death verdict under the rubric of the vague factor. 486 U.S. at 364. "Substituting" a finding under a narrower, and thus quite different factor does not arguably remove the effects on the verdict of the jury's unlimited and unguided discretion under the invalid factor. Thus, the Colorado Court's harmless error analysis is unsupported by *Clemons*.

The Colorado Supreme Court nowise indicated that it was concerned with, or was considering the extensive mitigation in its analysis. This, like the above issue, is also consistent with Colorado precedent, which consistently refuses to have appellate courts making factual findings.

This court's opinion and holding in *Clemons* necessarily envisages these tasks of finding mitigation and giving weights to factors to courts finding harmless error due to the *other* evidence of aggravation and mitigation. The appellate court **MUST** at least consider the weights of the aggravating factors and the mitigation, and **MUST ITSELF** decide whether the state has met its burden proving death is the appropriate sentence. There is no other possible means of arriving at that conclusion. This court stressed that the Mississippi Supreme Court had recognized and asserted its authority to perform these tasks. 108 L.Ed.2d at 737. Here, the Colorado Supreme Court did not purport

to consider mitigation or the nature of the aggravation; it simply did not do what an appellate court must do in order to find harmless error.

This court's reliance upon *Barclay* support these arguments. In *Barclay*, the appellate court had before it written findings on aggravating and mitigating factors, and the sentencer's rationale for imposing death, *i.e.*, the weights it gave the factors. 463 U.S. at 953. "There is no reason why the Florida Suprme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the verdict." *Id.*, at 958. Thus, the appellate court could easily consider the matters necessary to arrive at a rational harmless error decision.

This court should grant the writ and review and correct these misinterpretation and misapplications of its precedents.

VI. NUMEROUS JURY INSTRUCTIONS AND COMMENTS BY THE TRIAL COURT AND PROSECUTION MISLED THE JURY INTO THINKING THAT ANY JURY VERDICT OF DEATH WAS NOT FINAL OR BINDING ON THE TRIAL COURT, WHICH WOULD ITSELF DECIDE WHETHER A DEATH SENTENCE WOULD BE IMPOSED, CONTRARY TO COLORADO LAW AND IN VIOLATION OF *CALDWELL V. MISSISSIPPI*, 472 U.S. 320 (1985), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985) this Court held:

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere."

The prosecutor's argument that the jury's decision was reviewable by appellate courts, tending to relieve the jury of its ultimate responsibility, was held to violate the Eighth Amendment. This Court stressed the heightened need for reliability in death cases. 472 U.S. at 329-330. This court also relied

upon "biases in favor of death sentences" when the state suggests to jurors that the "jury may shift its sense of responsibility to an appellate court." 472 U.S. at 330-332. The jurors may wish to "send a message" despite real convictions that death is not appropriate, because they think the error may be corrected on appeal. This Court cited several other reasons for its holding. All these reasons are equally forceful when the jury is misled into thinking that its decision may be only a recommendation to the trial court.

Under Colorado's death statute, C.R.S. § 16-11-103 (2)(c), the jury's death verdict is binding on the trial court.

In Mr. Rodriguez' trial the trial court and prosecutors committed the same types of errors which caused this Court to vacate the death sentence in *Caldwell*, multiplied many times. Through **many** statements and instructions, they unambiguously communicated to the jurors that any death verdict was not binding, but was at most merely a recommendation, possibly to be considered by the court when it sentenced the accused, or that the jurors were merely expressing community outrage, entirely aside from the sentence to be imposed.

Colorado's Supreme Court held, before *Caldwell*, that the sentencing jury must be unambiguously informed that its decisions at the penalty phase are binding on the trial court, based on principles identical to those cited by this court in *Caldwell*. *People v. Durre*, 690 P.2d 165 (Colo. 1984).[24] In *People v. Drake*, 748 P.2d 1237 (Colo. 1988), the Court found that the trial court's "failure to instruct the jury in unambiguous terms that the jury's verdicts with

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24. In *Durre*, five jurors informed the court that they did not think that death was the appropriate punishment although, under the instructions as given, they felt compelled to vote for that penalty. Because of this, and because the trial court's instructions did not adequately "inform the jury of the effect of its verdicts on the issue of punishment" 690 P.2d at 173-174, "there [was] sufficient doubt cast on the unanimous character of the verdicts returned as to render them uncertain and unreliable." 690 P.2d at 174.

respect to the presence or absence of mitigating and aggravating factors would be the sole determinants of whether the defendant would be sentenced to life imprisonment or to death," 748 P.2d at 1252, required reversal of the death sentence under *Durre*.[25] That was the situation at the conclusion of the *Drake* trial, yet because the trial court had failed to follow the *Durre* holding and unambiguously inform the jury of the binding effects of its various findings, reversal was mandated. The Court also found *Caldwell* error because the state argued that the police and prosecution had brought the case and that "the system" and "the law" meant that the jury's decision was "a shared responsibility." 748 P.2d at 1258-1259.[26]

In Mr. Rodriguez' case, the trial court fully intended to instruct the jury that its death verdict was not binding. During jury voir dire, defense counsel's attempt to inform prospective jurors that they were not to act as representatives of their neighborhoods or community was successfully objected to by the state (v.23, p.29) The court refused to give correct, alternative instructions tendered by Mr. Rodriguez on almost every instruction in which the misleading and incorrect language occurred. The court altered instructions tendered by Mr. Rodriguez to remove their unequivocal directions that the jury's decision was binding, and instead gave equivocal or plainly wrong and misleading language to the contrary. That court gave basically the same instructions which the Colorado Supreme Court held to be error in *Durre*.

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25. That statutory scheme, unlike the one at issue here, mandated a death sentence if the jury found at least one aggravating factor and no mitigating factors. There were other possible scenarios under the statute.

26. We must conclude that such comments, by implying that the jury had only an indirect or advisory role rather than the ultimate role in the imposition of sentence, were improper and, although not dispositive, constitute an additional factor casting doubt upon the reliability of the sentence in this case.
748 P.2d at 1259.

Further, Instruction No. 25 at the penalty phase provided:

> You are instructed that for purposes of sentencing, Counts One and Two [murder after deliberation and felony murder] merge *and the Defendant will receive a life sentence.* (v.3, p.784, emphasis added).

This instruction can only be read as meaning that, regardless of what the jurors say "should be" the "appropriate" penalty, Mr. Rodriguez *will* receive a life sentence from the court for the two counts of first-degree murder. By itself, this instruction requires that the death sentence be reversed. Incredibly, this instruction is only slightly inconsistent with the others, because they communicate the purely recommendational nature, at most, of the jury's verdict. The proposition that there was no reasonable likelihood that any juror would *believe* Instruction No. 25 is not plausible, yet it was necessarily the unspoken basis for the Colorado Supreme Court's affirmance.

The Colorado Supreme Court completely ignored this instruction, and most of the others noted herein, when it addressed this issue.

The trial court gave Instruction No. 23 to the jury, over objection:

> The manner of inflicting the punishment of death in the State of Colorado is by the administration of lethal gas. You must *assume* that the penalty of death will be carried out *if imposed by the Court pursuant to the jury verdict.* (v. 3, p. 782, emphasis added.)[27]

The "if imposed by the Court pursuant to the jury verdict" clause interjected such uncertainty and ambiguity into the jury's verdict as to violate the heightened reliability and certainty requirements imposed by the Cruel and Unusual and Due Process Clauses. *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Mills v. Maryland*, 486 U.S. 367 (1988); *Maynard v. Cartwright*, 486 U.S. 356

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27. Mr. Rodriguez tendered the following instruction, which the court rejected:

> The manner of inflicting the punishment of death in the State of Colorado is by the administration of lethal cyanide gas. The penalty of death will be carried out if you impose it. (v3,p723)

(1988); *Lockett v. Ohio*, 438 U.S. 586 (1978).

Further, "assume" in this context means "to take for granted: accept arbitrarily or tentatively: **SUPPOSE**" Webster's Third New International Dictionary, 133. Synonyms are "affect, pretend, simulate, feign, counterfeit, sham."

The Colorado Court rejected this latter argument by referring to its decision in *People v. Davis*, 794 P.2d 159 (Colo. 1990), where it addressed a similar instruction by stating that the jury would read "assume" as conveying "that if they voted for death, the defendant would indeed be executed." 794 P.2d at 196. That reading of the instruction is obviously unfounded and is contrary to any normal English usage.

The court gave several similar, reinforcing instructions. The jurors were informed at the outset that *the court, not the jury would actually make the life or death decision.* The court gave every prospective juror the following instruction about the jury's tasks:

> In the event the accused is found guilty of first degree murder, a second hearing will be conducted in front of the same jury. Evidence will be presented at this hearing. At the conclusion of the hearing the jury will determine whether certain statutory, aggravating factors have been proven beyond a reasonable doubt, and also the jury will determine whether any mitigating circumstances exist. *Depending on the determination of the jury, the court will enter a sentence of life imprisonment or impose the death penalty.* (v. 21, p. 264; emphasis added.)

See also, v. 14, p. 51; v. 14, p. 185; v. 16, p. 219-220; v. 17, p. 56; v. 18, p. 66; v. 19, p. 103-104; v. 20, p. 76.[28]

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28. Mr. Rodriguez tendered a proposed preliminary instruction which provided, in pertinent part:

> Finally, the jury will decide whether the accused will be sentenced to life in prison *or will receive the death penalty.* (v. 1, p. 158; emphasis added).

The court's preliminary instructions here were more misleading than those very similar instructions found constitutionally inadequate in *Durre* and *Drake*, and much more misleading than the arguments in *Caldwell*.[29]

Further, the trial court and prosecutors clearly communicated to the jurors that they were supposed to act, not as individuals expressing their personal consciences, but as 'representatives of the *community*', expressing the community's feelings and concerns. It is clear that the court saw this as the jury's proper role. During closing arguments the prosecutors explicitly argued that the jurors should act as representatives of the community, and further that the 'ultimate' decision was "up to the judge."(v. 34, p. 168-169)[30] The Colorado Supreme Court upheld these arguments, and held the jury could be urged to act as "representatives of the community" or as the "conscience of the community." 794 P.2d at 977.

The jurors may well thus have understood that their role was solely to "send a message" of community outrage. Under the court's instructions, they

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It was this tendered instruction which the trial court altered and gave as above. There can be no question about the message the court wished to convey.

29. In *Durre*, the Court stated:

> Although the trial court at the outset of the sentencing hearing advised the jurors that their verdicts "will determine what penalty shall be imposed," such advice told the jurors nothing whatever about the effect of their verdicts on the life and death decision that the jurors were being required to make.
>
> 690 P.2d at 174, n.15.

30. The prosecution also argued:

> And, besides, besides, even if he does get caught, the worst thing the defendant figures could happen to him is the same thing, life in jail; *nobody gets the death penalty in Colorado; the inmates at Canon City know that.* (v. 34, p. 122, emphasis added).
>
> The Colorado Supreme Court ignored this argument.

may or may not have thought that their verdict of death could or would have any effect on the trial court's "ultimate" decision. The jurors may just have been justifiably confused. In any case, Mr. Rodriguez was denied a fair trial by impartial jury, due process, and his rights under the Cruel and Unusual Punishment Clauses.

The other instruction did not remedy the error of Nos. 23, 25 and the preliminary instructions. Even if they were contradictory, there can be no doubt that there is an extremely strong possibility that one or more jurors got the message those instructions so clearly sent.[31]

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31. Instruction No. 1 referred to the jury's "sentencing decision," and spoke only of "evaluating [the] facts in light of the requirements set forth in these instructions." (v. 3, p. 757) Instruction No. 2 told the jury it was its "duty to decide whether Frank D. Rodriguez *should* be put to death or whether he *should* be sentenced to life imprisonment."(v. 3, p. 758) *Should* denotes a recommendation, not a final decision, and was repeated several times in the instructions. (E.g., v. 3, p. 768). Instruction No. 3 mentioned "a verdict sentencing Frank D. Rodriguez to life in prison," but, in contrast, said "a verdict of death." (v. 3, p. 759) Instruction No. 13 mentioned, ". . . . you may sentence the defendant to life in prison." (v. 3, p. 769) Instruction No. 14 informed the jury that if its "verdict" could not be unanimous, "the result will be a sentence of life imprisonment imposed by the Court."(v. 3, p. 770) This reinforced the error of No. 23 and the preliminary instructions. The jury was told that the court imposed a life sentence if the jury could not agree, and that the court imposed a sentence -- possibly death -- if the jury agreed on that.

Mr. Rodriguez' tendered Instructions 1 and 2, on the other hand, stated, ". . . . your decision on whether to sentence Mr. Rodriguez to life in prison or to death." and "you will . . . . decide whether Mr. Rodriguez receives a sentence of life in prison or a sentence of death. That decision is yours and yours alone," (v. 3, p. 685), and ". . . . in deciding whether Mr. Rodriguez will be put to death or be sentenced to life in prison;" and, "finally, you must decide whether Mr. Rodriguez will be sentenced to life in prison or to death."(v. 3, p. 686) Mr. Rodriguez' tendered Instruction No. 5 spoke explicitly of, "[a]ny verdict you return sentencing Mr. Rodriguez to death," "your verdict sentencing Mr. Rodriguez to life," "a verdict sentencing Mr. Rodriguez to life in prison," and "whether Mr. Rodriguez *shall* be sentenced to life in prison or to death." (v. 3, p. 690) The trial court's intended message is obvious.

Instruction No. 15 spoke of the "death is the appropriate punishment" concept. (v. 3, p. 771) In its discussion of the crucial final step, it stated only: ". . . whether the defendant *should be* sentenced to death or life imprisonment," and "the death penalty is the appropriate punishment. . . ."(v. 3, p. 772). The contrast with Mr. Rodriguez' proposed language is striking.

The court's Instruction No. 21, the "great detail" instruction on the jury's life or death decisions, supplied only the following language:

> ". . . .then the jury shall determine if death is the appropriate punishment in this case." (v3,p780)

The verdict form continued and reinforced the erroneous and misleading theme. The jury could "sentence the Defendant . . . to life in prison," or it could "find that death is the appropriate punishment." Absent was, "We, the jury, sentence the Defendant to death."[32]

The *only way* a reasonable juror could understand the language of No. 23 and all the other instructions -- excepting No. 25 -- together was to conclude that a death verdict was not binding on the court. With no. 25 added to the brew, at best the jurors were merely confused. Absent from *any* instructions was *any* indication, contradicting the other instructions, that their finding "that death is the appropriate punishment" was binding on the trial court. On the contrary, Instruction No. 23 and, by implication and as compared to the very clear language concerning the other alternatives, the other instructions mentioned above reasonably would have led a juror to believe that they could not conclusively impose a death sentence, or that the trial court got the final word, "depending on the determination of the jury" as to aggravators.

There is undoubtedly a reasonable probability that a juror could have so interpreted the instructions, and the death sentence must be vacated. *Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316 (1990); *Mills v. Maryland*, 486 U.S. 367, 375-78, 384 (1988). The level of erroneous and, at best, contradictory instructions in this case exceeds the level of error in *Caldwell.*

VII. THE STATE'S EGREGIOUS AND PERVASIVE MISCONDUCT DURING CLOSING ARGUMENTS AT THE PENALTY PHASE DENIED MR. RODRIGUEZ HIS RIGHTS

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32. Mr. Rodriguez' tendered Verdict was unambiguous:

I. We, the jury, impose a sentence of life imprisonment.
II. We, the jury, unanimously impose a sentence of life in prison on Frank Rodriguez.
* * * *
IV. We, the jury, unanimously impose a death sentence on Frank Rodriguez.(v3,p745)

UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, ESPECIALLY WHEN COMBINED WITH THE COURT'S ORDER THAT DEFENSE COUNSEL NOT OBJECT TO THE MISCONDUCT AND THE INSTRUCTIONS TO THE JURY.

A. General Standards.

Prosecutorial misconduct during closing arguments in the penalty phase is commonplace, and predictably so in light of its effectiveness and the unwillingness of appellate courts to enforce recognized standards in the area. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986).

The general standards for acceptable prosecutorial argument are well known. The most basic and in this case most ignored standard is that "[t]he duty of the prosecutor is to seek justice, not merely to convict," American Bar Association Standards Relating to the Prosecution Function, 3-1.1(c), *see Berger v. United States*, 295 U.S. 78 (1935); *People v. Goldsberry*, 181 Colo. 406, 509 P.2d 801 (1973). *See also*, ABA Standards Relating to the Prosecution Function, Standards 3-1.1 (d), 3-5.6 (b), 3-5.8 (a)-(e), The Colorado Code of Professional Responsibility , DR 7-102, 7-106.

The state's gross improprieties denied Mr. Rodriguez his rights under the Due Process Clause because they were intended to and did deprive him of a "fair" trial. *Berger v. United States, supra*; *Darden v. Wainwright, supra.* They denied him his rights under the Trial by Jury Clause because they were intended to and did mislead and inflame the jury so thoroughly that it could no longer make an impartial, fair decision. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

The prosecutor's misconduct denied Mr. Rodriguez his rights under the Cruel and Unusual Punishment Clause because they were intended to and did divert the jury's attention from its constitutionally and statutorily-required

tasks and because it injected irrelevant and improper considerations into the jury's deliberations. *Booth v. Maryland*, 482 U.S. 496 (1987); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Darden v. Wainwright, supra*, 477 U.S. at 188 (Blackmun, dissenting); *Zant v. Stephens*, 462 U.S. 862 (1983); *Gardner v. Florida*, 430 U.S. 349, at 357-58 (1977), where this court noted the principles that "death is different," and the necessity that death sentences be and appear to be based on "reason rather than caprice or emotion."

B. The order not to object.

The third time defense counsel objected during prosecutor Silverman's argument, the following occurred, *according to the existing transcripts, which are significantly incorrect*:

> **MR. SILVERMAN** [prosecutor]: It's a very rare combination of a crime and a defendant that satisfies so many of the statutory criteria.
> **MR. EISNER** [Defense counsel]: Objection, judge, to any comparison to this to other cases.
> **THE COURT**: Overruled. Let Mr. Silverman finish his argument.
> **MR. EISNER**: Can the court please tell the jury I have a right to object?
> **THE COURT**: Mr. Eisner.
> **MR. EISNER**: Thank you, Judge.
> **THE COURT**: Let Mr. Silverman finish his argument.
> **MR. EISNER**: Just for clarification ---
> **THE COURT**: Mr. Eisner, please have a seat.[33]

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33. In fact, the following passage is much closer to the truth:

> **MR. SILVERMAN** [prosecutor]: It's a very rare combination of a crime and a defendant that satisfies so many of the statutory criteria.
> **MR. EISNER** [Defense counsel]: Objection, judge, to any comparison to this to other cases.
> **THE COURT**: Overruled Mr. Eisner, sit down and let Mr. Silverman finish his argument without any further objection.
> **MR EISNER**: Can the Court please tell the jury I have a right to object?
> **THE COURT**: Mr. Eisner, shut up and sit down.
> **MR. EISNER**: Thank you, judge.
> **THE COURT**: Let Mr. Silverman finish his argument, without interruption.
> **MR. EISNER**: Just for clarification--
> **THE COURT**: Mr. Eisner, sit down and be quiet.

> **MR. SILVERMAN**: This sort of conduct is rarely seen in Colorado, but we have seen it here; all sorts of things that make the crime worse than your average first degree murder. There are other things; this defendant's terribly extensive and violent background make him far worse than your typical cold-blooded killer. (v.34, p.102)

I.e., defense counsel was ordered to not object.

C. The Instructional Context

The trial court refused to instruct the jury that bias, prejudice or public opinion against Mr. Rodriguez, and sympathy for the victim, should not be considered by the jury at the penalty phase.(v3,p704; Defendant's Tendered Instruction No. 19(a).) *See* Argument VI. The court refused to give such an instruction at the guilt phase. (v.30, p. 4, 32) The trial co ' refused to instruct the jury that it should not consider the argument and statements of counsel in making its decisions. (Defendant's Tendered Instruction No. 3; v3,p687). The trial court, in violation of the death statute, C.R.S. § 16-11-103(2), did not instruct the jury to base its life or death decision solely on the statutory considerations. The trial court placed no limits on the jury in its final decision. *See* Argument IV. Thus, the jurors were free to consider everything suggested by the prosecutors.

D. The many instances of misconduct.

This petition contains many examples of this prosecutorial misconduct. *See* Statement of the Case and Facts pertaining to this Argument. *See also e.g.* Argument I, concerning arguments about matters which had been specifically prohibited by court order and about which Mr. Rodriguez was not allowed to present evidence in mitigation and rebuttal; II, concerning the arguments that sympathy for the victim and her family were legitimate aggravating factors, that

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See Argument VII, below.

the jury should decide the case based in their emotional response to the victim; IV, concerning the unlimited discretion given the jury to consider any factor or consideration it wished, including those many improper ones argued by the state; VI, concerning the jury's ability to consider many of the state's improper arguments under the rubric of the "especially heinous" aggravating factor. The Partial Opening Brief of Frank D. Rodriguez, Argument I, Appendix 5 to this petition, contains a detailed listing of many of the instances, plus extensive authority concerning their impropriety. However, the Colorado Supreme Court held that only arguments urging a death verdict because it would be cheaper than a life sentence, and those asserting that this case and accused were much worse than other cases and accused people were erroneous, but harmless. *People v. Rodriguez*, 794 P.2d 965, 988 (Colo. 1990).

The prosecutors engaged in as extensive and egregiously improper misconduct during closing arguments at the penalty phase of this capital case as has appeared in any recent published decision. Defense counsel filed a Motion in Limine regarding such misconduct before those arguments, (v.3, p.680) and he objected three times during those arguments before the trial court ordered him to sit down and allow the prosecution to finish its arguments, (v.34, p.102), ironically in response to an argument which the trial court had just ruled was obviously improper. (v.34, p.96)

The prosecution argued such things as the jurors should consider their personal financial interest in killing the accused instead of supporting him in prison. *E.g.*, "Nobody wants to support this man for the rest of his life." (v.34, p.113, 118);[34] that they should base their decision on emotion, not reason

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34. Cost is "wholly unrelated to the blameworthiness of a particular defendant." Booth v. Maryland, 96 L.Ed.2d at 449. The personal financial interests of the jurors is an arbitrary and capricious factor upon which to base a life or death decision, and its consideration by a juror plainly violates due process and the Cruel and Unusual Punishment Clauses. Such arguments have

(v.34, p.182); that sympathy for the victim and the victim's family were aggravating factors (v.34, p.99, 109, 113, 170); that the jurors should decide the case as if they were the victim; "Can you imagine how disgusting it would be to be raped by this defendant? Can you imagine being anally raped by this defendant? I am not just talking to the women on this jury. I am talking to everybody on the jury."(v.34, p.110)[35]; that the demands of the community and the victim's family for the death penalty were aggravating factors (v.34, p.99, 113, 168-169, 173, 182);[36] **that the accused's apparent racism was an aggravating factor (v.34, p.110)**; that this case was far worse than other first-degree murder cases, and the accused's background was much worse than others charged with that crime, making this case appropriate for the death penalty (v.34, p.102);[37] that the accused was not human and therefor did not

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been universally condemned, in the death context and elsewhere. *Tucker v. Kemp*, 762 F.2d 1480 (11th Cir.1985); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (death penalty cases); *State v. Jordan*, 80 Ariz. 193, 294 P.2d 677 (1956) (death penalty case); *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985) (death penalty case); *State v. Perry*, 274 Minn. 1, 142 N.W.2d 573 (1966) (murder case); *Pennington v. State*, 172 Tex. Crim. 40, 353 S.W.2d 451 (1962) (robbery case; argument regarding cost of trial and retrial especially prejudicial since court's overruling of objection conveyed to jurors that argument a valid consideration); *State v. Gullrandson*, 238 Minn. 508, 57 N.W.2d 419 (1953) (*sua sponte* reversal for argument concerning cost of trial); *State v. Muskus*, 158 Ohio St. 276, 109 N.E.2d 15 (1952) (arguments concerning cost of trial and cost of supporting defendant in prison "grossly improper" and especially prejudicial because of tacit approval conveyed by overruling of objection).

35. *See, People v. DeHerrera*, 697 P.2d 734 (Colo. 1985); *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984); *Collier v. State, supra*, *People v. Burnette*, 30 Ill.2d 359, 197 N.E.2d 436 (1964); *People v. Holman*, 103 Ill.2d 133, 469 N.E.2d 119 (1984); *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985).

36. Such arguments have been regularly and rightfully condemned. *People v. Salazar*, 648 P.2d 157 (Colo. App. 1981); *State v. Smart*, 299 S.E.2d 686 (S.C. 1982); *Darden v. Wainwright, supra*; *State v. Agner*, 30 Ohio App. 2d 96, 283 N.E.2d 443 (1972); *Cortney v. State*, 683 S.W.2d 419 (Tex. Crim. 1984); *Reed v. State*, 333 So.2d 524 (Fla. App. 1976); *Kovash v. State*, 519 P.2d 517 (Okla. Crim. 1974).

37. Mr. Silverman represented to the jury, from his position of authority and

deserve to live (v.34, p.115, 125);[38] that the accused was on a "leash on the streets of Denver" (v.34, p.121).[39]

The prosecutors misstated the law in critical respects, for example asserting falsely that Mr. Rodriguez could be eligible for parole in twenty years if given a life sentence, when the court had already ruled that this was not to be the case, (v.34, p.113).[40]

Thus, this case far outstrips the facts of *Darden*, or of any case within defense counsel's knowledge. The prosecutors simply *did not care* what they had to do in order to obtain a death verdict. No constitutional right of the accused, no court order, no supposed requirement that the jury's decision be based on reason, not emotion and caprice, was going to stand in their way.

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theoretically superior knowledge, that Mr. Rodriguez' case was different and more serious than other cases, and was thus proper for the death penalty. *Tucker v. Kemp*, 762 F.2d 1480 (11th Cir. 1985); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985); *State v. Koon*, 298 S.E.2d 769 (S.C. 1982); *State v. Smart*, 299 S.E.2d 686 (S.C. 1982).

38. The Due Process and Cruel and Unusual Punishment Clauses are premised on a respect for the humanity in every person, regardless of their crimes. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

39. *See Darden v. Wainwright*, where such an argument was condemned.

40. Judge Peterson can do that, and it's also true this defendant could get as little as twenty years before he is eligible for parole.
It maybe only twenty years before he is eligible to meet that parole board, and you this defendant has a lot of practice with parole boards. . . .(v34,p113)
The prosecutors were aware that Mr. Rodriguez was not going to be eligible for parole in twenty years. They also successfully injected the fear that the parole board would mistakenly parole Mr. Rodriguez in twenty years. The first argument was improper because it was false, the second because it was speculative and intended only to prey upon jurors' fears and distrust of their government. Such arguments have been rightly condemned; *Darden v. Wainwright, supra*; *Tucker v. Kemp, supra* 762 F.2d 1496; *People v. Brisbon*, 106 Ill.2d 342, 478 N.E.2d 402 (1985); *Commonwealth v. Floyd*, 506 Pa. 85, 484 A.2d 365 (1984).

The Colorado Supreme Court's *approval* of such conduct and of arguments is telling proof of the necessity that this court grant the writ and reaffirm that the requirements of reliability and reason that this court has so often declared still have application in the State of Colorado.

VIII. THE FAILURE OF THE STATE OF COLORADO TO PROVIDE AN ADEQUATE RECORD ON APPEAL IN THIS CAPITAL CASE VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CONFLICTS WITH THIS COURT'S HOLDINGS IN SUCH CASES AS *GREGG V. GEORGIA*, 428 U.S. 153 (1976), AND *GRIFFIN V. ILLINOIS*, 351 U.S. 12 (1956).

Hundreds of juror questionnaires, exhibits, motions, tendered jury instructions and other court documents, were missing from the record on appeal in the Colorado Supreme Court in this case. Those critically important portions of the record have apparently been lost or otherwise disposed of by the trial court. Further, the existing transcripts of the trial and pretrial proceedings are manifestly incorrect and incomplete. An existing, sealed transcript of a hearing on the mental competency of Mr. Rodriguez to stand trial has simply never been made part of the record on appeal. All of the numerous efforts by Mr. Rodriguez to correct or complete the record have been unsuccessful. The State of Colorado's and Colorado Supreme Court's failure to follow this court's precedents and the fundamental constitutional principles which entitle the accused in a capital appeal to an adequate record on appeal merits the granting of the writ.

Despite his indigency, Mr. Rodriguez is entitled to a complete and accurate record on appeal under the Equal Protection Clause. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Draper v. Washington*, 372 U.S. 487 (1963). That right has regularly been enforced by the Colorado Supreme Court until Mr. Rodriguez' case. *Pacheco v. People*, 146 Colo. 200, 360 P.2d 975, 976 (1961);

Hawkins v. Superior Court, 196 Colo. 86, 580 P.2d 811 (1978).

In *Eskridge v. Washington State Board of Prison Terms and Parole*, 357 U.S. 214 (1958), this Court rejected the notion that the trial court could judge whether prejudicial error had occurred as a condition of the accused getting a transcript for appeal. In *Lane v. Brown*, 372 U.S. 477 (1963), this court rejected the argument that even defense counsel could prejudge the potential merits of the accused's appeal as a condition for the accused receiving a transcript.

The Eighth Amendment requires special appellate review of a death judgment. The necessity of appellate review to guard against the forces of arbitrariness, prejudice and irrationality which arise in the death penalty process has been noted often by this Court. In *Proffitt v. Florida*, 428 U.S. 242, 253, 258-260 (1976), *Gregg v. Georgia*, 428 U.S. 153, 204-206, 211-212, 222-224 (1976), and *Jurek v. Texas*, 428 U.S. 262, 276 (1976), this Court upheld those state's death statutes because of the rigorous appellate review each state conducted in such cases. *See Pulley v. Harris*, 456 U.S. 37, 43-46 (1984), (Stevens, J. concurring in part), for a review of those decisions *vis-a-vis* appellate review. This court has often stressed the importance of careful appellate review to its approval of the death penalty. For example, in *Zant v. Stephens*, 462 U.S. 862 (1983), this court reaffirmed its decision in *Gregg* that the Georgia statute was constitutional because the scheme "provides for categorical narrowing at the definitional stage, and for individualized determination and appellate review at the selection stage." Id. at 879. In *McKleskey v. Kemp*, 481 U.S. 279, 95 L.Ed.2d 262, 284, 292-293, n.37 (1987), this court cited Georgia's appellate review scheme as a reason for holding that its capital seBtencing system did not violate the Eighth Amendment. In *Barclay v. Florida*, 463 U.S. 939, 953-958, 963968 (1983), this court relied

heavily on Florida's rigorous appellate review in upholding an otherwise error-ridden sentence. This court also found that the important appellate review it had relied on in *Proffitt* was, indeed, occurring. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the court relied heavily on Florida's apellate review scheme to uphold non-jury sentencing in death cases.

In the course of these decisions this court has made telling references to the necessity of appellate review in death cases. For example, in *Barclay*, 463 U.S at 973, Justice Stevens noted that the Florida Supreme Court had reversed 92 of the 212 death judgments it had reviewed from 1972 until 1983.

This Court's decisions require that death cases demand more attention towards the rights of the accused and a special need for reliability. *E.g.*, *Mills v. Maryland*, 486 U.S. 367, 394-95 (1988); *Spaziano v. Florida*, 468 U.S. 447, 456 ("We reaffirm our commitment to the demands of reliability in decisions involving death..."); *Beck v. Alabama*, 447 U.S. 625 (1980). The Due Process and Cruel and Unusual Punishment Clauses require an especially searching review of any decision by the state to kill. Those clauses also require that, whenever a right to appeal exists, the accused must be allowed the means to pursue it without the trial court destroying the record.

Mr. Rodriguez had a right to the effective assistance of of counsel on his direct appeal of right under the Sixth Amendment. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963). Without an adequate record, this right is meaningless.

Mr. Rodriguez was plainly denied all of these rights in this case.

Mr. Rodriguez requested that transcripts of all proceedings, all exhibits, and copies of all documents in the court file be transmitted to the Supreme Court for the appeal. When the record was transmitted to that Court, and it was apparent that many materials were not had , he filed motions to complete

the record. It soon became apparent that many hundreds of court documents were simply missyng from the trial court's file. Mr. Rodriguez' several subsequent efforts to locate those documents and to have the cause remanded to the trial court pursuant to Colo. Appellate Rule 10[41] in order to correct the record were all denied by the Supreme Court.[42]

On January 6, 1989, twenty-five days before the Opening Brief was due, the court denied Mr. Rodriguez' last effort to have the record corrected before he had to file his opening brief and granted a request by the state that Mr. Rodriguez be ordered to file an "appendix" to his brief listing the missing and erroneous portions of the record which "he considers to be necessary for the purposes of appellate review." The court also ordered that Mr. Rodriguez attach copies of any of the missing documents in his counsel's possession. The court also ordered that the record could be supplemented or corrected by stipulation until the Opening Brief was filed. The Partial Opening Brief was filed on February 1, 1989, without such stipulations. Appendix 1 to that brief was a listing of the erroneous and missing parts of the record, copies of all of the missing documents which defense counsel had in his possession, as ordered, with several provisos. See Appendices 5 and 6.

The state filed its Answer Brief on May 31, 1989. Attached to it was a document entitled "Stipulations and Objections Regarding Alleged Omissions and Defects in Record." Therein the state purported to "stipulate" to some of the missing documents that had been attached to the Opening Brief. It objected to any delay in the appeal process, arguing that Mr. Rodriguez had

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41. See Appendix 4.

42. A compilation of the various motions filed by both sides, the Colorado Supreme Court's orders thereon, and a listing of the missing and erroenous portions of the record, are attached as Appendix 6. They reveal the extensive measures taken by Mr. Rodriguez to obtain relief.

not raised on appeal any issues pertaining to the missing materials or erroneous transcripts, so there were no grounds for allowing him any opportunity to obtain the materials or learn what the transcripts actually should say.

Mr. Rodriguez subsequently filed a Motion to Vacate Death Sentence Because of the Inadequate Record on Appeal. He objected to being required to file his briefs, and to the court deciding the case, on the basis of the inadequate record. He informed the court that, if the court desired them, he would provide the court with affidavits in support of his assertions regarding the trial court's orders during closing arguments in the penalty phase, the subject of two arguments on appeal, rather than proceeding with a remand to the trial court in order to correct he record, which is the procedure set forth by the Colorado Supreme Court in its Appellate Rule 10, and which is the procedure Mr. Rodriguez consistently attempted to implement.

The Colorado Supreme Court denied the motion. Mr. Rodriguez filed a Motion for Guidance, requesting that the court reveal what the status of the record on appeal was, and renewing the motion to have the record corrected. the Supreme Court denied that motion and affirmed the death sentence without mentioning any problems with the record except the dispute concerning the accuracy of the transcripts of the trial court's orders and statements to defense counsel during oral arguments. 794 P.2d at 990. There the court disingenuously ejected Mr. Rodriguez' arguments regarding the disputed record on the ground that Mr. Rodriguez' "unsworn" allegations regarding the erroneous transcripts could not overcome the "presumption" that the record was correct.[43] Mr. Rodriguez' efforts to present "sworn" evidence were

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43. That court also held, in a *non-sequitur*, that, even had the trial court told defense counsel to "shut up and sit down" during closing arguments, there was no error since the court had reviewed the state's closing arguments as if proper

uniformly rebuffed by the court. The court has never indicated to what use it has put the supposedly "stipulated" portions of the record.

The following materials, among others, were missing from the record during the appeal to the Colorado Supreme Court.[44]

1) **Over three hundred sworn juror questionnaires**, which replaced much of the usual jury voir dire of the court and counsel regarding exposure to pretrial publicity and death penalty issues, are missing and were apparently lost or disposed of by the trial court. The court and counsel made many references to the questionnaires during jury selection. Only the questionnaires for eleven of the twelve jurors who decided the case were included in the record.

The loss of the questionnaires precluded appellate counsel from knowing, much less raising as error or using to support his arguments, the jurors' responses therein. Without the questionnaires, any argument made by Mr. Rodriguez concerning the court's excusing or failing to excuse a juror, or concerning the court's refusal to allow defense counsel to participate in voir dire on alleged hardship and publicity issues, would fail. Under Colorado law, if the accused has "failed" to present the court with an obviously relevant portion of the record concerning jury selection, it is presumed that the missing portions of the record fully support and justify the trial court's actions. See, e.g., People v. Morgan, 199 Colo. 237, 606 P.2d 1296 (1980).

2) The sealed transcript of the hearing concerning Mr. Rodriguez' competency to stand trial exists but Mr. Rodriguez cannot gain access to it.

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objections had been made. However, the issue was whether those statements had denied Mr. Rodriguez due process of law, effective assistance of counsel and a trial by impartial jury by so denigrating defense counsel in front of the jury. 794 P.2d 990.

44. Appendices 6 and to some extent 5 contain a more complete listing.

The trial court simply refused to send the transcript to the Clerk of the Supreme Court **until** Mr. Rodriguez raised the issue of his competency to stand trial on appeal. Of course, without knowing what occurred during the hearing, that was completely impossible.

3) The court reporter failed to record the reading of any of the jury instructions. In one known instance, the trial court refused to read the written instruction that the jury should not to consider prejudice or sympathy at the first phase, despite defense counsel's repeated requests. See v30, p4,32. Appellate counsel cannot discover if the court similarly refused to read other crucial instructions to the jurors at the guilt or penalty phases, or whether there were any objections made by either side concerning what or how the court read to the jury. The trial court's failure to read or incorrect reading of any number of instructions could be error under Colorado law. *See, e.g., People v. Cowden*, 735 P.2d 199 (Colo. 1987); *People v. Freeman*, 668 P.2d 1371 (Colo. 1983); *People v. Archuleta*, 180 Colo. 156, 503 P.2d 346 (1970). Considering the demonstrated refusal of the trial court to read critical instructions to the jury, the inability of defense counsel to discover and raise such issues in this case denied Mr. Rodriguez all of the rights noted herein.

Amazingly, the Colorado Supreme Court cited the trial court's supposed submission of the "no sympathy or prejudice" instruction to the jury at the first phase in upholding the trial court's failure to preclude the jury from considering bias, prejudice or public opinion against the accused at the penalty phase. 794 P.2d at 987-88.

4) Numerous tendered and refused jury instructions, submitted by Mr. Rodriguez and the state, were missing from the record on appeal.

5) Several exhibits and pretrial exhibits are missing, including, e.g., an affidavit in support of a motion to recuse a judge, and exhibits relating to the

motives of the primary prosecution witness to lie and the benefits granted her by the state.

6) The other transcripts are erroneous and/or incomplete in dozens of instances. In one instance, the exchange between defense counsel and the trial court when the court tired of defense counsel's objections during the prosecution's grossly improper arguments during the penalty phase, was manifestly incorrectly transcribed. The existing transcript does not reflect that the court ordered counsel to "shut up and sit down," as Mr. Rodriguez has asserted it should.

The incomplete, inadequate and erroneous record on appeal in this case, the Colorado Supreme Court's refusal to permit Mr. Rodriguez to attempt to correct any correctable deficiencies in the record, that court's orders requiring Mr. Rodriguez to file his Opening and Reply Briefs before the record was corrected or the actual state of the record was known, that court's delegating to the state the authority to decide whether or not the record should be corrected or supplemented, and that court's action in upholding the death sentence on the basis of the incomplete, inadequate record and without even indicating the actual status of the record, violate all of the many precedents of this court set forth above. This court should grant the writ.

CONCLUSION

For all of the above reasons, this Court should issue a writ of certiorari to the Colorado Supreme Court and review and reverse that court's decision in this case.

DATED: 11/21, 1990.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon Robert Petrusak, Asst. Attorney General of the State of Colorado, by mail or hand delivery, at 110 16th St. Denver, CO, 80202, on November 23, 1990, and that the state is the only party required to be served in this case.

APPENDIX A

Respondent's Answer Brief in Colorado Supreme Court

SUPREME COURT, STATE OF COLORADO

Case No. 87SA48
Appeal from the District Court of Denver County
Honorable CONNIE L. PETERSON, Judge

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

MAY 31 1989

Mac V. Danford, Clerk

ANSWER BRIEF

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee

vs.

FRANK D. RODRIGUEZ,

Defendant-Appellant.

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SUPREME COURT, STATE OF COLORADO

Case No. 87SA48
Appeal from the District Court of Denver County
Honorable CONNIE L. PETERSON, Judge

ANSWER BRIEF

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

FRANK D. RODRIGUEZ,

Defendant-Appellant.

SUPPLEMENTAL STATEMENT OF THE CASE

On December 12, 1986, a jury found defendant guilty of first-degree murder after deliberation and felony-murder in connection with the November 14, 1984, killing of 54-year-old Lorraine Martelli (v. 31, pp. 2-3). It also convicted defendant of four other substantive offenses for his criminal conduct against Miss Martelli (first-degree sexual assault, a class 2 felony, second-degree kidnapping of a sexual assault victim, a class 2 felony, aggravated robbery, a class 3 felony, and aggravated motor vehicle theft, a class 4 felony), three separate counts of conspiracy (to commit first-degree murder, second-degree kidnapping, and aggravated motor vehicle theft), and five counts of crime of violence.

Habitual offender proceedings followed these verdicts. On December 13, 1986, the jury adjudicated defendant an habitual offender on the basis of three prior felony convictions (v. 32, p. 63, ll. 6-24). These prior judgments were a 1975 conviction for attempted burglary, a 1979 conviction for second-degree burglary, and a 1979 conviction for aggravated robbery. (Id., v. 1, p. 6). Defendant had entered pleas of guilty to each of these offenses (v. 1, p. 6). His 1979 plea to aggravated robbery represented a negotiated disposition of a criminal episode in which the victim, Judy Archuleta, also was kidnapped and sexually assaulted (v. 33, pp. 59, 88). Defendant's three previous felony convictions thus subjected him to mandatory life imprisonment on the basis of a conviction for any of the several felonies committed against Lorraine Martelli. See sec. 16-13-101, C.R.S. (1986).

After completion of habitual offender proceedings, this matter proceeded to a penalty phase in which the People sought a death sentence for the murder of Miss Martelli. Of the seven separate aggravating circumstances which were alleged pursuant to sec. 16-11-103, C.R.S. (1986), the jury found six proven beyond a reasonable doubt: intentionally killing a kidnap victim (v. 3, p. 746); intentionally causing the death of Miss Martelli in furtherance of a class 3 or greater felony (v. 3, p. 748); agreeing with others to kill Lorraine Martelli and intentionally killing her in furtherance of this agreement (v. 3, p. 749); committing murder while under a sentence of imprisonment for a prior class 3 felony (v. 3, p. 750); committing murder for the purpose of avoiding or preventing a lawful arrest or prosecution (v. 3, p. 751); and, committing murder in an especially heinous, cruel or depraved manner (v. 3, p. 752). Only the allegation that the murder was committed for pecuniary gain was determined not to be established by proof beyond a reasonable doubt (v. 3, p. 747).

The jury was instructed that it could consider various specific factors in mitigation including the roles of defendant and his co-defendants in the crimes and the sentences received by those co-defendants (v. 3, p. 778), and, that it could consider any other non-specific mitigating factor which constituted a reason for not imposing a death

sentence (v. 3, p. 778). The jury then found that there were insufficient mitigating factors to outweigh the aggravating factors and that death was the appropriate punishment beyond a reasonable doubt (v. 1, p. 753).

Defendant has brought this appeal and prior to the filing of his Opening Brief he sought remand because of alleged defects and omissions in the record. This Court ordered defendant to append his brief with materials which he believed were omitted. Because all but one of the claims in defendant's appendices (see Part IX, infra) do not relate to the issues in the Opening Brief, the People will address these claims issues in a separate pleading. In this pleading, the People will stipulate to certain matters and object to or deny other matters.

SUPPLEMENTAL STATEMENT OF THE FACTS

A. The People's Case for a Death Sentence

In seeking the death penalty, the People emphasized that when defendant deliberately murdered Lorraine Martelli he was on parole for aggravated robbery, had three prior felony convictions, and had just kidnapped and raped a victim who could identify him and thus return him to prison for the rest of his life (v. 34, pp. 105-107, 120-124, 170-171, 182-185). The People described how defendant had a strong inclination to kill witnesses to his efforts to rob or rape because of previous experiences where such victims survived and were able to identify him (v. 33, pp. 31-45). The People also argued that punishing this murder by anything less than death would in effect impose no punishment beyond what defendant would have received for the several lesser felonies committed against Lorraine Martelli before she was murdered (e.g., v. 23, pp. 182-185). The People argued that any penalty short of death would mean that defendant had lost absolutely nothing by killing Miss Martelli to avoid prosecution and life imprisonment

for the lesser felonies committed prior to the murder (v. 34, pp. 105-107, 120-124, 170-171, 182-185). Thus, the People argued that the value of Lorraine Martelli's life warranted a punishment more severe than the life in prison to which defendant was effectively subject by virtue of his conduct prior to the killing (v. 34, p. 123, ll. 7-17).

In support of this position, the People relied on the following evidence set forth in chronological order:

On December 3, 1978, 21-year-old Judy Archuleta was kidnapped and raped by defendant, defendant's brother, Chris Rodriguez, and another assailant named Carlos (v. 33, pp. 60-72). Judy Archuleta had a 3-month-old baby at this time and on the afternoon of December 3, 1978, she had been planning to drive this infant and her two parents from her apartment to her parent's home (v. 33, pp. 59-62). Mrs. Archuleta decided to warm up her car so its interior would not be too cold for her child (Id.). She went to her car, started it and noticed it had been parked on a patch of ice (Id.). She then decided to move it so her mother and father would not have to walk on a slippery surface (Id.).

Mrs. Archuleta drove her car a short distance and parked (v. 33, pp. 62-65). As she was getting out of her car, defendant grabbed her by the hair and put a knife to her neck (Id.). Defendant then forced Mrs. Archuleta back into her car, a Pinto hatchback (Id.). Defendant's brother got into the rear seat (Id.). Carlos drove the vehicle while defendant sat in the right-side passenger seat with Mrs. Archuleta between them (Id.). Defendant's brother grabbed Judy Archuleta by the hair and pulled her into the back of the car where he had folded down the rear seat (v. 33, p. 65, ll. 18-23). Defendant's brother stripped her of all her clothes and then raped her vaginally for several minutes (v. 33, pp. 65-67). Defendant remained in the front seat watching and

laughing (Id.).

After his brother had finished, defendant said "it's my turn" and got into the back of the car with the victim (v. 33, pp.67-69). First defendant forced Judy Archuleta to orally copulate his penis (Id.). Defendant then penetrated Mrs. Archuleta anally and when she complained of pain, he said, "Shut-up, you know you like it" (Id.). Defendant then forced the victim to turn over onto her back so he could penetrate her vaginally (v. 33, pp. 68-69). During these sexual assaults, defendant took Judy Archuleta's bracelet and watch (Id.). Afterwards, Carlos got in the back and vaginally penetrated this victim while defendant drove the car (Id).

After this last sexual assault, defendant stated, "Well now we have to kill her because she recognized us" (v. 33, p. 70, ll. 10-11). However, defendant's brother persuaded his companions to simply "dump" the victim and she was left under a viaduct with her clothing (v. 33, p. 70, ll. 11-18). At this point, defendant told Judy Archuleta that if she would "go tell the cops we will come back and kill you and your baby." Id. Nonetheless, Mrs. Archuleta did report this incident to the police and defendant ultimately pled guilty to aggravated robbery in a plea-bargained disposition (v. 33, p. 88, ll. 6-10).

Various inconsistencies in Judy Archuleta's testimony are noted at pp. 24-25 of defendant's opening brief. These inconsistencies related to whether it was defendant or one of his companions who wielded the knife, whether defendant forced the victim to orally copulate his penis or whether he only penetrated her vaginally, and whether defendant and his brother had the conversation described above in which defendant wanted to kill Mrs. Archuleta while his brother wanted to spare her (v. 33, pp. 74-86). However, it was uncontroverted that in December, 1978, Judy Archuleta was kidnapped,

robbed, and raped by defendant and each of his two companions and that Mrs. Archuleta reported this incident resulting in defendant's third felony conviction and a prison term from which he was not paroled until April 5, 1984 (v. 33, pp. 90-98, 105-106).[1] Defendant thus was under parole supervision for his crimes against Judy Archuleta when he kidnapped, raped, robbed, and murdered Lorraine Martelli (v. 33, p. 105, ll. 9-23).

Defendant knew the consequences of violating parole (v. 33, p. 114, ll. 13-14). Nonetheless, on November 4, 1984, he apparently conspired with two others to rob a man named George Stapleton (v. 33, pp. 41-42, 115-118). Mr. Stapleton had been living apart from his wife and children (v. 31, p. 116, ll. 8-22). On the evening of November 4, 1984, Mr. Stapleton went to a bar, had a few drinks and then went to a fast food restaurant near Sixth Avenue and Broadway in Denver (v. 22, pp. 116-118). After eating, Mr. Stapleton headed south on Broadway and saw what he believed to be a prostitute standing near a corner (v. 33, p. 118, ll. 9-20). Stapleton drove around a block and met this woman near the entrance to an alley (v. 33, pp. 119-121). He talked with this woman and she apparently agreed to perform fellatio on Stapleton in exchange for money (Id.). She then directed Stapleton to drive up the alley and wait behind an auto body shop (Id.). Mr. Stapleton followed these directions and the woman walked up to his car and put her hands on the driver's door (v. 33, p. 122, ll. 1-9). Stapleton then saw someone in his side-view mirror and turned around to see defendant holding a gun (v. 33, pp. 122-123).

Immediately after Stapleton looked at him, defendant extended the gun toward Stapleton and fired (Id.). The first shot hit Stapleton in the cheek, lodging in the back

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[1] Defendant was paroled to a Denver County detainer and served about 3 months in County jail before being released in July, 1984 (defendant's Exhibit 38, life history, p. 20).

of his neck, about 1/16 of an inch from his spinal chord (v. 33, pp. 122-124). Its impact caused Stapleton to fall over toward the passenger side of his front seat (Id.). Defendant fired another shot that went through Stapleton's shoulder and lodged in his skull (v. 33, pp. 125-126). Defendant then fired a third bullet which lodged in Stapleton's chest, another bullet which grazed Stapleton's neck causing a "bloody wound," and a fifth bullet which missed completely (Id.). Miraculously, Stapleton still was able to drive to Denver General Hospital, where he received emergency treatment (v. 33, pp.127-128). Stapleton survived although the first bullet still remains in his neck, too close to the spinal chord to permit surgical removal (v. 33, p. 28, ll. 14-24).

Defendant was accompanied by his brother, Chris, during this scheme to rob a man seeking a prostitute (v. 33, pp. 135-136). However, Stapleton was certain that it was defendant, and not Chris Rodriguez, who fired the gunshots (v. 33, p. 136, ll. 4-13).

Ten days later, defendant committed the crimes against Lorraine Martelli which culminated in her death from multiple knife wounds. This episode began on the afternoon of November 14 when Patricia Thomas, David Martinez, defendant, and defendant's brother, Chris, met at Martinez' home and went for a drive in a stolen Pontiac (v. 24, pp. 174-176). Defendant drove this car and after a while decided to abandon it and steal another (v. 24, pp. 177-178). Defendant had an ignition key for a Plymouth or Dodge and he and his brother began checking parking lots for such cars (v. 23, pp. 177-179). Patricia Thomas and David Martinez acted as lookouts while defendant and his brother found a Dodge or Plymouth, entered it, and tried to start it (v. 24, pp. 179-181).

However, before the Rodriguez brothers could start this car, Lorraine Martelli walked past them (v. 24, pp. 182-183). Miss Martelli momentarily glanced at the

Rodriguez brothers and they immediately followed her (Id.). She tried to walk faster (Id.), but was unable to elude defendant and his brother. The Rodriguez brothers followed the victim to her car, a Chevrolet Monte Carlo, they forced their way into this vehicle and took her hostage (v. 24, pp. 119-122, 183-185). Miss Martelli was forced to sit in the middle of the front seat while defendant sat behind the wheel and his brother sat to her right (v. 24, pp. 122-124, 186-188). Lorraine Martelli briefly struggled and sounded her car horn (v. 24, p. 124, ll. 1-12). This attracted the attention of a bystander who noted the Monte Carlo's license plate number and notified police (v. 24, pp. 124-126). This bystander also saw defendant back the Monte Carlo out across an alley and strike another car before driving away (v. 24, pp. 124-125). This car theft and abduction took place in daylight at about 4 p.m. (v. 24, pp. 119-120).

Defendant then picked up Patricia Thomas and David Martinez who sat in the rear seat of the Monte Carlo (v. 24, pp. 186-189). Chris stuffed a blue rag in Lorraine Martelli's mouth (v. 24, p. 217, ll. 6-20).

Defendant next drove to a liquor store where he bought beer with money taken from Miss Martelli's purse (v. 24, pp. 191-192). Then defendant drove a few blocks and stopped so the parties could change seats; the victim was moved to the back seat and Patricia Thomas and David Martinez moved to the front (v. 24, pp.192-195). Chris Rodriguez got in back with Lorraine Martelli (Id.).

Defendant then drove to a housing project, parked the Monte Carlo, and went into a private home where he bought marijuana (v. 24, pp. 195-197). During this time, Chris Rodriguez sexually assaulted Lorraine Martelli in the back seat of her car (v. 24, pp. 196-198). This assault continued even after defendant returned and began driving toward the Sixth Avenue Freeway (Id.). Chris stopped sexually assaulting Miss Martelli

about the time defendant turned onto this highway (v. 24, p. 199, ll. 1-15).

Defendant drove as far west as Lookout Mountain before returning to Denver (v. 24, pp. 198-200). During this drive Lorraine Martelli asked what would become of her (v. 24, p. 200, ll. 9-20). Chris said they probably would let her go (Id). Defendant said that the victim had seen their faces and they had to kill her (Id.).

Defendant drove to a dimly lit and deserted dead-end near some warehouses (v. 24, pp. 200-202). Defendant parked the car, and both he and Chris got out and began to physically fight (v. 2, pp. 204-205). Chris received a cut on his lip as a result of this fist fight (v. 25, p. 20, ll. 3-7). David Martinez and Patricia Thomas also had exited the car at this time, leaving Lorraine Martelli alone in the car (v. 24, pp. 205-206). She tried to lock the doors but defendant caught her, struck her, and said she was "stupid" (v. 24, p. 206, ll. 11-14).

Defendant then forced Lorraine Martelli into the back seat of her Monte Carlo where he had her orally copulate his penis (v. 24, pp. 207-208). Defendant then penetrated her vaginally (v. 24, p. 208, ll. 2-9). Chris Rodriguez thought defendant was taking too much time to rape Lorraine Martelli and told him to hurry (v. 24, p. 208, ll. 13-19). Defendant became angry, got out of the car, and said that Chris had his "thrill" and now he wanted his (v. 24, p. 208, ll. 13-22).

Defendant went back in the car, where he continued to sexually assault the victim until he ejaculated. (See v. 27, pp. 196-197). Lorraine Martelli's corpse later would evidence both vaginal and anal tearing and bleeding as a result of these rapes by the Rodriguez brothers (v. 24, pp. 27-32; v. 28, pp. 22-23).

Chris, David Martinez, and Patricia Thomas got back in Lorraine's Monte Carlo (v. 24, p. 208, ll. 16-25). Chris got behind the wheel, drove a short distance, and shut

off the lights and engine (v. 24, p. 209, ll. 1-11). Defendant then asked Chris for a knife and Chris asked David Martinez about such a weapon (v. 24, pp. 209-210). These three then looked for a knife until one was found in defendant's back pocket (v. 24, pp. 209-210).

Lorraine Martelli then asked if she could talk to Patricia to plead for her life (v. 24, p. 211, ll. 12-17). Defendant refused, saying Miss Martelli was "stupid" (v. 24, p. 211, ll. 21-25). Lorraine Martelli prayed aloud and defendant began choking and cutting her (v. 24, pp. 41, 46, 210-212).

Although he was armed with a large folding knife, defendant did not try to end the victim's life quickly. Instead, he squeezed her neck in a head-lock with enough force to fracture her thyroid cartilage and cause abrasions on her skin (v. 24, pp. 41-46). At this time, defendant also tortured Lorraine Martelli with shallow knife cuts around her neck and face (v. 24, pp. 38-40). Miss Martelli also was struck several times about the face with a fist as evidenced by two black eyes and other facial bruises (v. 24, pp. 47-49).

Medical examination showed that Lorraine Martelli had "defense wounds" on her right arm and shoulder which suggested that she tried to turn away from a "multiple assault on the front" (v. 24, pp. 50-51). This assault could have consisted of punches with a fist (see v. 24, p. 49, ll. 2-10) and the "torture or teasing" injuries with a knife, that is, the shallow knife cuts which were inflicted around the victim's neck and face (v. 24, pp. 38-40). One of these cuts started on the right side of the larynx and went across the center of the throat and then curved downward toward the collar bone; another horizontal cut was made below this one; another was made directly beneath the chin (v. 24, p. 39, ll. 3-10). Defendant apparently applied the head-lock or strangle-hold to Lorraine Martelli to enable him to inflict these shallow cuts to her neck and chin (v.

24, p. 41, ll. 1-24).

After inflicting these torture cuts, defendant stabbed Miss Martelli approximately 28 additional times (v. 24, pp. 62-63). The victim may have sustained two of these 28 wounds as she tried to defend herself by turning her right arm toward defendant (Id.).

This effort was to no avail as defendant stabbed her 18 times in the chest and upper abdomen and 7 or 8 times in the back (Id.). Two of these knife cuts intersected in a manner that appeared to create only one entry wound but two separate thrusts were discernable to the medical examiner (v. 24, p. 63, ll. 4-11). In fact, there were several other smaller cuts which this examiner did not include in this total of 28 wounds (Id.).

Four of the 28 serious stab wounds cut into Lorraine Martelli's heart (v. 24, p. 56, ll. 11-15). Other knife-thrusts penetrated her upper chest, her liver, her rib cage, an area near her sternum, one of her armpits, and an area near her spine (v. 24, pp. 56-59, 64-65, 70-71). The thrusts to the rib cage fractured three ribs (id). In addition to the four wounds to the heart, the chest wounds showed six separate cuts in the left lung which caused it to collapse (v. 24, p.69, ll. 18-25). It was these heart and lung wounds that caused Lorraine Martelli to die through loss of blood (v. 24, p. 71, ll. 21-24). Exhibit L-3 (offered and admitted v. 24, p. 60, ll. 15-24) depicts just some of the violence done to this victim.

After Lorraine Martelli was raped, beaten, tortured, and fatally stabbed in the back seat, she was pulled out, dragged to the rear of her car, and placed in the trunk. Bruises on her back indicated that she was dropped and dragged on a hard surface (v. 24, p. 73, ll. 6-18). Patricia Thomas also described how defendant moved Lorraine Martelli's body into the trunk. Patricia Thomas watched defendant enlist David Martinez to help him carry the victim (v. 24, p. 213, ll. 16-24). Martinez opened the car door and

lifted one of Lorraine Martelli's arms but said he could not carry her (v. 24, p. 213, ll. 16-21). Chris and defendant then moved the victim's body to the trunk with or without the assistance of David Martinez (v. 24, p. 213, ll. 16-21; v. 25, pp. 29-30).

Afterwards, defendant, Chris, David, and Patricia drove to a friend's apartment, where Frank Rodriguez went inside while David and Chris tried to clean the car (v. 24, pp. 215-217). Then, Patricia Thomas, Chris Rodriguez, and David Martinez went inside where defendant, David and Chris drank beer and smoked marijuana (v. 24, pp. 218-222). Each of these four persons had blood on them when they entered the apartment (v. 24, pp. 219-220).

Laboratory analysis established that defendant had Lorraine Martelli's blood on his pants and on his undershorts (v. 27, pp. 193-195). Seminal fluid containing sperm and prostatic acid also was found on defendant's undershorts thus establishing that he had ejaculated (v. 27, pp. 195-197). David Martinez had the victim's blood on the left sleeve of his jacket and his own blood on his pants (v. 27, pp. 197-198). Contrary to representations at p. 22 of the Opening Brief, the serologist tested two separate blood-stained areas on these pants, not merely one such area (v. 27, p. 198, ll. 7-13). In addition, defendant apparently did not seek any independent testing of these pants. After his arrest, David Martinez still had his own blood on his hands but not the blood of the victim (v. 27, pp. 198-199). Martinez' clothing also evidenced a complete absence of semen stains (v. 27, pp. 202-203).

Chris Rodriguez had his own blood on his clothing and the blood of Lorraine Martelli in his jacket pocket (v. 27, pp. 190-192). A bloodstain found on a curb near the scene of the killing also matched Chris Rodriguez' blood type corroborating testimony that he had a fist fight with defendant in this area (v. 27, pp. 200-201).

Three of defendant's head hairs were found on Lorraine's sweater (v. 28, p. 21, ll. 14-20). Chris Rodriguez' pubic hair and head hair was found in the victim's vaginal area and anus (v. 28, p. 22, ll. 2-20). Pubic hairs from the victim also were found in Chris Rodriguez' undershorts (v. 28, pp. 22-23). A limb hair was found in the victim's vaginal area; it did not belong to defendant or his brother and had some similar characteristics to David Martinez' limb hairs but not enough similarity for any "meaningful weight" (v. 28, pp. 19-20, 21-22). Two head hairs and a body hair all of unidentifiable origin also were found in the victim's vaginal area (v. 28, pp. 23-24). This was the extent of the evidence suggesting that David Martinez had sexually assaulted the victim. (See v. 28, p. 17, ll. 2-14, Opening Brief p. 24).

The folding knife used to stab Lorraine Martelli was recovered and tested. Defendant had opened this knife and given it to a 2-year-old boy in the apartment he visited after the killing (v. 26, pp. 183-185). A woman in the apartment immediately took it from the child and later turned it over to police (v. 26, pp. 185-186, 194-195). Human blood was found on this weapon but not in sufficient quantities to permit typing (v. 27, p. 200, ll. 10-17).

Defendant left the apartment to buy more beer and a police officer saw him driving Lorraine Martelli's Monte Carlo. Denver police were looking for this car because it previously had been identified as the vehicle in which Miss Martelli had been abducted (e.g., v. 25, pp. 214-216). A chase ensued and defendant eluded the police and apparently brought beer (v. 25, pp. 140-146, 205-210). Shortly thereafter, two officers saw defendant running toward an alley and he was tackled and handcuffed by one of these patrolmen (v. 25, p. 146, ll. 5-14). Defendant had fresh scratch marks on his arms, stomach, and back at this time (v. 25, pp. 172-175). Defendant also had a grin on his

face during much of the subsequent booking procedure (v. 25, p. 171, ll. 5-22, People's Exhibit F-10, identified p. 171, ll. 5-11, admitted pp. 172-173).

While being detained in the Denver county jail awaiting trial, defendant corresponded and conversed with Margie Marquez, a female inmate. Defendant indicated to Miss Marquez that he had procured and used drugs while incarcerated (v. 24, p. 146, ll. 7-19). Defendant also discussed the possibility of Miss Marquez bringing him drugs after she got out (v. 29, pp. 96-97) and the possibility of him making money "inside" with Miss Marquez' help (v. 29, p. 145, ll. 1-17). Defendant's letters also evidenced boasts about escaping and his bias or contempt for blacks, whites, and homosexuals. (See defendant's Exhibit 20, identified, v. 28, p. 81, ll. 10-20, admitted, v. 28, p. 82, ll. 4-7 portions attached as Appendix A.) Regardless of his motives in putting his thoughts in writing, defendant's letters revealed the thinking behind his efforts to kill to avoid prosecution for lesser crimes. With regard to George Stapleton, defendant wrote

> (w)hen I read about the shooting in the new's paper's I was surprised to read that the puck (sic) didn't die. He is a eye witness against me. It would of been better if he did died than I wouldn't have to worrier about him coming to court on me.

People's Exhibit Q-2, identified, v. 28, pp. 61-62, admitted v. 28, p. 68, ll. 8-9).

With regard to Lorraine Martelli defendant wrote:

> I had to kill her, If I wouldn't have killed her she would of pick my picture out of the mug books from the cop's.... I had to do what I did because I new (sic) that I couldn't leave any witnesses alive to come to court on me later.

Id.

B. Defendant's Case for Life Imprisonment.

Defendant did not dispute that the murder of Lorraine Martelli was committed with the aggravating factors alleged by the prosecution. Indeed, defense counsel made the following remarks to the jury:

> Before you reach this ultimate question, though, the one of whether or not death is appropriate, you have to take some intermediate steps. The first one is: Do these aggravating factors exist? There is no question they do. Mr. Silverman put them up for you in graphic display. There is no question that they have proven them beyond a reasonable doubt.

(v. 34, p. 139, ll. 6-11).

Rather than dispute the existence of the aggravators, defendant simply claimed that some of them overlapped in a manner which diminished their weight (v. 34, p. 139, ll. 12-23). He then disputed that he was the person most responsible for the admittedly aggravated manner of the killing (v. 34, pp. 139-143), arguing that it was David Martinez who wielded the knife and killed the victim in the admittedly cruel, heinous, and depraved manner (e.g. v. 34, p. 145, ll. 20-21). He thus claimed that it would be unjust to sentence him to death when Martinez received only a 20-year sentence (v. 34, pp. 141-145). He also claimed that his background, including his upbringing and lack of vocational opportunities, as well as intoxication on the night of the killing, were mitigating factors (e.g. v. 34, pp. 146-149).

Evidence supporting his first claim included the fact that there were knife cuts on the little fingers of both of David Martinez' hands (v. 24, pp. 84-85). The folding knife which was the murder weapon had a defective locking mechanism which could allow the blade to fold and cut the person using it (v. 24, p. 66, ll. 15-19, p. 79, ll. 16-19). However, most of the major stab wounds "were fairly regular" as if "performed by a single pattern of force" (v. 24, p. 62, ll. 4-8). This suggested that the knife blade went "clean in and clean out" without collapsing (v. 24, p. 62, ll. 4-9, pp. 65-67). The

one exception which showed oddly-shaped skin portions was the result of the two wounds inflicted in the same place (v. 24, p. 62, ll. 10-22). In any event, there was simply no physical evidence that the murder weapon buckled upon being thrust into the victim's body even when it struck bone (v. 24, pp. 65-69). An examination of this weapon also showed that despite a defective locking mechanism, it could be thrust in a manner that would not cause the person using it to be cut (v. 24, pp. 67-68).

Defendant also argued that David Martinez may have sexually assaulted the victim (e.g. v. 34, p. 144, ll. 13-18). However, the evidence supporting this argument consisted of little more than the fact that certain unidentifiable hairs turned up on the victim's body. Admittedly, one of these hairs was a human limb hair with some characteristics which were similar to Martinez' limb hair. However, these characteristics still were insufficient to permit meaningful identification (v. 28, pp. 19-22). Moreover, this hair was found in the victim's "vaginal area," not inside her anus or vagina and Martinez unquestionably handled this unclothed victim in his attempt to help carry her to the trunk of her car.

Defendant also argued that his letters to Margie Marquez which described how he killed Lorraine Martelli to avoid prosecution were part of a hoax to obtain a lenient disposition of charges against Miss Marquez (e.g. v. 24, p. 155, ll. 14-25). However, Margie Marquez appeared as a witness and admitted that she was never promised anything for turning over the letters and that, in effect, she turned them over "for free" (v. 29, p. 128, ll. 5-15).

Defendant argued that his intoxication on the date of the killing mitigated the killing as did his upbringing and background (v. 34, pp. 146-150). He also argued that he was sorry for this offense (v. 34, pp. 150-151) and that his character contained other

redemptive qualities such as the ability to work hard, improve himself and be valued by his family (v. 34, pp. 152-156). Finally, he argued that he was no longer a threat to anyone and that therefore he should not be put to death (v. 34, pp. 165-167).

SUMMARY OF THE ARGUMENT

1. The prosecutors' closing arguments were largely fair comments on the evidence or fair comments on the established propensities of defendant, particularly given his claim that he was no longer a danger to anyone. Similarly, these closing arguments generally were relevant to the People's theory that life imprisonment for the murder of Lorraine Martelli would have had no deterrent or punitive effect upon this defendant. In no event did the closing arguments infect the trial with any unfairness which undermined the reliability of the verdict or denied some constitutional right.

2. The jury was not instructed that it had to unanimously agree on a mitigating factor before any juror could consider that factor. Defendant's claims in this regard are entirely speculative. Indeed, the instructions taken as a whole along with arguments of counsel clearly informed each juror that he or she individually could rely on any mitigating factor to compel a life sentence and that unanimity was not necessary in this regard.

3. Given the undisputed evidence of serious physical abuse and torture in this case, there was no unconstitutional application of the concepts "especially heinous, cruel, or depraved," even without further limiting instructions from the court.

4. The jury was properly instructed that its verdict would conclusively determine whether defendant was given life imprisonment or put to death. Comments by the court and counsel generally reinforced this instruction and there can be no doubt whatsoever that the jurors fully realized the consequences of their verdict.

5. The instructions and verdict form complied with the statutory requirements and constitutionally channeled the jury's discretion. Any inconsistencies in the instructions or verdict form operated to the defendant's advantage, including the instruction that at the fourth and final stage of deliberation, the decision was solely in the jury's discretion.

6. The trial court properly refused to give the defendant's pro-defendant, anti-victim sympathy instruction because the law does not require that such be given, particularly where the jury is told to use reason in making its ultimate penalty decision. In any event, the jury was instructed that it could have "mercy," a synonym for sympathy, for the defendant and also was instructed during the guilt phase that it should not be influenced by sympathy or prejudice and that it should "completely disregard" media coverage.

7. The trial court correctly instructed the jury that it could not employ numerical considerations in its weighing of the mitigating or aggravating factors presented at the penalty phase. And, the jury explicitly was instructed to weigh aggravating and mitigating factors.

8. There was no carryover of the complicity instruction used at the guilt phase to sentencing and the trial court was correct in refusing defendant's instruction that the jury must ignore complicity theories at the penalty stage. Tison v. Arizona and enmund v. Florida do not preclude, but permit, imposition of the death penalty on a complicitor who had the requisite intent and degree of involvement in committing the crime as long as the sentence is based on the individual's own culpability.

9. The trial court's handling of defendant's repeated objections to the prosecutor's closing arguments constituted neither an abuse of discretion nor a denial of

any constitutional right.

ARGUMENT

I. THE PROSECUTORS' CLOSING ARGUMENTS WERE LARGELY FAIR COMMENTS ON THE EVIDENCE OR ON THE ESTABLISHED PROPENSITIES OF DEFENDANT PARTICULARLY GIVEN HIS CLAIM THAT HE WAS NO LONGER A DANGER TO ANYONE. SIMILARLY, THESE CLOSING ARGUMENTS WERE GENERALLY RELEVANT TO THE PEOPLE'S THEORY THAT LIFE IMPRISONMENT FOR THE MURDER OF LORRAINE MARTELLI WOULD HAVE HAD NO DETERRENT OR PUNITIVE EFFECT UPON THIS DEFENDANT. IN NO EVENT DID THE CLOSING ARGUMENTS INFECT THE TRIAL WITH ANY UNFAIRNESS WHICH UNDERMINED THE RELIABILITY OF THE VERDICT OR DENIED SOME CONSTITUTIONAL RIGHT.

Defendant alleges that the prosecutorial misconduct during closing argument denied him various constitutional rights, especially when combined with purported restrictions on his right to object and the instructions to the jury. Defendant's complaints about instructions will be fully dealt with in parts II, IV, V, VI, VII, and VIII of this brief, infra. Defendant's claim that the trial court ordered him not to object will be addressed in this argument although it will be more fully evaluated in part IX below. Defendant's 23 separate allegations of misconduct in closing argument will be addressed in this part I. All these claims lack merit.

Initially, defendant's claim that the trial court "ordered" him not to object is belied by the fact that he continued to object after this alleged "order" and never was held in contempt or otherwise directed to refrain from objecting. To the contrary, three of defendant's subsequent objections were sustained (v. 34, p. 115, ll. 18-23; p. 116, ll. 13-16; p. 124, ll. 5-7). Thus, there simply was no order by the court prohibiting defense

objections and defendant misconstrues the record in this regard. See Argument IX, infra.

Accordingly, a "plain error" standard of review should apply to those many instances where defendant made no timely objection to comments now complained of for the first time on appeal. See e.g., Wilson v. People, 743 P.2d 415 (Colo. 1987). Such remarks should not warrant reversal unless they so undermined the fundamental fairness of the penalty phase as to cast serious doubt on the reliability of the verdict. Id. The plain error standard applies to death sentencing proceedings. E.g., People v. Adcox, 47 Cal. 3d 207, 253 Cal. Rptr. 55, 763 P.2d 906 (1988). Thus, prosecutorial statements to which a timely objection was not made are subject to a different standard of appellate review than comments to which a timely objection gave a trial judge opportunity to correct a possible impropriety. E.g., Adcox, supra (failure to object waives claim of prosecutorial misconduct unless there was reasonable probability that outcome was affected); People v. McDowell, 46 Cal. 3d 551, 250 Cal.Rptr. 530, 763 P.2d 1269 (1988) (same); People v. Lucky, 45 Cal. 3d 259, 247 Cal.Rptr. 1, 753 P.2d 1052 (1988) (failure to object to curable misconduct constitutes a waiver in penalty phase); Stewart v. State, 757 P.2d 388 (Okla. Crim. 1988) (impropriety not reversible error in absence of timely objection); Nave v. State, 757 S.W. 2d 249 (Mo. App. 1988) (failure to make proper objection waives error); Conner v. State, 303 S.E. 2d 266 (Ga. 1983) (improper remarks not grounds for reversal in absence of objection). See also State v. DePew, 38 Ohio St. 275, 528 N.E.2d (1988) (prejudicial remark minimized by curative instruction). Indeed, a defendant's failure to object is a consideration in the ultimate determination of whether prosecutorial comment rendered the trial fundamentally unfair. High v. Kemp, 819 F.2d 988 (11th Cir. 1987). Accord, Wilson, supra. Here, defendant made timely objections

in only 7 of the 23 instances of alleged misconduct, that is, those numbered 3, 5, 7, 8, 10, 11, and 12 in the opening brief. Thus, every other allegation should be reviewed only if there was unfairness so severe as to render the verdict unreliable. E.g., Adcox, supra; McDowell, supra.

However, no error, much less plain error, resulted from most of the prosecutorial comments of which defendant now complains. Defendants complaints fall into four general areas: first, that the prosecutors inflamed the emotions of the jury to create fear and vengeance; (Opening Brief, instances numbered 1, 4, 5, 6, 8, 15, 16, 19, 20); second, that the prosecutors asked the jurors to act as the conscience of the community (Id., instances 1, 4, 5, 6, 10); third, that the prosecutors commented on the future dangerousness of defendant, that is his desire to escape, force sex on other prisoners, lead or influence criminal conduct and participate in drug trafficking or gang activities (Id., instances 7, 8, 9, 17, 21); and fourth, that the prosecutors created sympathy for the victim and her family (Id., instances 11, 13). Defendant also makes various miscellaneous complaints that the prosecutors argued that an execution would save money (instance 2), that the prosecutors denigrated the value of defense evidence (instance 3), diminished the jury's sense of responsibility for a death sentence (instance 18), and gave improper "testimony" about the appropriateness of a death sentence (instance 12), and finally, that the prosecutors made improper comments on similar transaction evidence (instance 14), on poverty as an excuse for crime (instance 22) and upon defendant's efforts to "con" or fool the jury (instance 23). Defendant's complaints generally misconstrue the law relating to prosecutorial argument or the context in which the remarks were made.

A. Legal Standards

First, emotional appeals are inevitable and proper in capital sentencing proceedings. Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986); Conner, supra. Indeed, an "outrageous murder" warrants a "fiery plea" on the part of a prosecutor. Tamme v. Commonwealth, 759 S.W. 2d 51 (Ky. 1988). Accordingly, strong language by a prosecutor is permissible to impress the jury with the gravity of the case. Id. Accord Patillo v. State, 368 S.E. 2d 493 (Ga. 1988); Ford v. State, 335 S.E. 2d 567 (Ga. 1985); Commonwealth v. Travaglia, 467 A.2d 288 (Pa. 1983); Conner, supra. Such language may refer to various subjects including the victim, Ford, supra; State v. Rice, 110 Wash. 2d 577, 757 P.2d 889, 906-07 (1988); the prevalence of crime, State v. Clemmons, 753 S.W. 2d 901 (Mo. banc 1988), and the need for strict law enforcement, Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987); State v. Sloan, 756 S.W. 2d 503 (Mo. banc. 1988).

A prosecutor should not however, use emotion to divert the jury from its proper role, to cause unwarranted speculation, or to advocate any form of extra-legal death for a defendant. See Darden v. Wainwright, 477 U.S. 168 (1986) (prosecutor suggested that suicide or accidental death for defendant would have been just). State v. Brown, 753 P.2d 908 (Okla. Crim. App. 1988) (prosecutor should not create speculation regarding effect of victim's death). Similarly, a prosecutor may not seek to inflame the racial, religious, ethnic, political, economic or other prejudices of a juror. People v. Marin, 686 P.2d 1351, 1355 (Colo. App. 1983). However, he is not required to restrict his references to the victim's death to purely "abstract" or "antiseptic" terms devoid of any common meaning or affect. Id. Accordingly, he may personalize the death of a victim by referring to the normal, everyday things that a living person may do. Id. Accord McDowell, supra, at 1281, Ford, supra. See also State v. Middleton, 368 S.E. 2d 457, 459-60 (S.C. 1988) (sentence other than death represented as mockery of victim). State

v. Copeland, 530 So. 2d 526, 545 (La. 1988) (jury told to look at picture of 11 year old victim if it hesitated to give death). People v. Williams, 44 Cal.3d 883, 245 Cal.Rptr. 336, 751 P.2d 395 (1988) (comment about victim which did not seriously threaten jury's objectivity not improper).

Similarly, a prosecutor may use strong, emotional language to emphasize the appropriateness of the death penalty or the social objectives which may be achieved by applying it in a particular case. E.g., Coleman v. Brown, supra; Clemmons, supra; Sloan, supra; Ford, supra; Patillo, supra; Walker v. State, 337 S.E. 2d 475 (Ga. 1985). In any event, emotional appeals are entirely proper when they relate to the circumstances of a particular case or the aggravators and mitigators which a jury must weigh, and a mere claim that the prosecutors used excessive emotion does not entitle a defendant to reversal of his death sentence. See e.g., Darden v. Wainwright, supra, Coleman v. Brown, supra.

Second, appeals to the jury to act as spokespersons for the community generally are permissible. United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1988). Indeed, it is the function of a capital sentencing jury to express the conscience of the community on the ultimate question of life or death. Witherspoon v. Illinois, 391 U.S. 510 (1968), Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987); Accord State v. Bell, 360 S.E. 2d 706 (S.C. 1987); People v. Durre, 690 P.2d 165 (Colo. 1984). Murder is considered an offense against the community and thus appeals to the jury to speak for the community in determining punishment are not improper. See State v. Mastrachio, 546 A.2d 165, 175 (R.I. 1988); People v. Spreitzer, 123 Ill. 2d 1, 525 N.E.2d 30 (1988); Robison v. Maynard, supra, at 1505. Such appeals are inappropriate only when they seek to inflame, Lester, supra, or to have the jury totally abandon its discretion. See People v. Salazar, 648 P.2d 157 (Colo. App. 1981).

Third, comments on a defendant's future dangerousness are not improper regardless of whether or not his future dangerousness specifically is alleged as an aggravating factor. E.g. State v. Beuke, 38 Ohio St. 3d 29, 526 N.E. 2d 274, 280 (1988); People v. Bean, 46 Cal. 3d 919, 251 Cal.Rptr. 467, 760 P.2d 996 (1988), Lucky, supra, 753 P.2d at 1975, n. 22. People v. Davenport, 41 Cal. 3d 247, 221 Cal.Rptr. 794, 710 P.2d 861 (1985); see also West's Ann. Cal. Penal Code, sec. 190.2, 190.3 (future dangerousness not an aggravating factor in California); Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985) (future dangerousness may be argued as part of a defendant's individual characteristics). Such comments are proper argument particularly where they do not suggest that experts consider the defendant to be dangerous. People v. Adcox, supra, or where they rebut a defendant's claims that he will be rehabilitated, People v. Hendricks, 44 Cal. 3d 635, 244 Cal.Rptr. 181, 749 P.2d 836, 843 (1988), or that he will never again endanger anyone, People v. Dyer, 45 Cal.3d 26, 246 Cal. Rptr. 209, 753 P.2d 1 (1988). Thus, a prosecutor may argue that a defendant, on the basis of prior violence or other conduct, may present a danger to other inmates or staff. Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987); Lucky, supra, n. 22 at p. 1074, accord People v. Bean, supra; People v. Heishman, 45 Cal. 3d 147, 246 Cal. Rptr. 673, 753 P.2d 629 (1988); see also People v. Poggi, 45 Cal. 3d 306, 246 Cal. Rptr. 886, 753 P.2d 1082 (1988) (prosecutor could suggest that defendant could present danger of sexual assaults upon other inmates).

Prosecutors thus may ask juries to contemplate a defendant's potential for future violence as long as such potential is not represented to be an aggravating factor. People v. Thompson, 45 Cal. 3d 86, 246 Cal. Rptr. 245, 753 P.2d 37 (1988). Accordingly, comment on the risks of letting a defendant escape the death penalty are proper and

relevant to the weighing of aggravation and mitigation and to the ultimate question of the appropriateness of the death penalty. See e.g., Campbell v. Kincheloe, supra; Davis v. Kemp, supra; Bean, supra; Heishman, supra; State v. Tillman, 750 P.2d 546 (Utah 1987); People v. Bell, 44 Cal.3d 137, 241 Cal.Rptr. 890, 745 P.2d 573 (1987). See also Coleman v. Brown, supra, (prosecutor may comment on penological justification for death penalty as it relates to a particular defendant). Such comments thus relate to Colorado statutory considerations for capital sentencing pertaining to defendant's character and the weighing of aggravators and mitigators. See sec. 16-11-103(1)(b) and (2)(a), C.R.S. (1986). See also People v. Borrego, No. 89 SA 330, (Colo. May 22, 1989) (slip op. at p. 4) (sec. 16-11-103(1)(b) gives trial court "wide discretion" to determine what is relevant).

Finally, brief comments concerning the losses suffered by a victim or her family are not inappropriate. People v. Siripongs, 45 Cal. 3d 548, 247 Cal. Rptr. 729, 754 P.2d 1306, 1324-1325 (1988); Heishman, supra, 753 P.2d at 661; Dyer, supra, 753 P.2d at 35. Such comments properly may concern the jurors' moral assessment of the facts of a case as they reflect on whether a defendant should be put to death. Rice, supra; Heishman, supra. Granted, a slim majority held that a jury's consideration of a detailed victim-impact statement was grounds for reversing a death sentence. Booth v. Maryland, 482 U.S. ___, 96 L. Ed. 2d 440 (1987). However, the Supreme Court apparently will address this issue again in South Carolina v. Gathers, ___ U.S. ___ (___), 44 Crim. L. Rptr. 4198 (1988), and it well may find that "the amount of harm one causes does bear upon his personal responsibility." Booth, supra, Scalia J. dissenting. Moreover, there is a substantial difference between the submission of a lengthy victim impact statement which related extensive expressions of grief and trauma from members of the

victims' family and relatively brief comments which remind a jury of the impact of a murder on a victim's family. See State v. Greer, 39 Ohio St. 3d 236, 530 N.E. 2d 382 (1988); Dyer, supra. Depending on the outcome in Gathers, supra, the former might be perceived as creating a constitutionally unacceptable risk that the jury may impose a death sentence in an arbitrary and capricious manner. However, the latter comments create no such risk and thus are not grounds for reversal. E.g., State v. Mead, 544 A.2d 1146 (R.I. (1988); Siripongs, supra; Greer, supra; Dyer, supra; Beuke, supra; Stewart, supra. Thus, brief references to the victim's family, although poignant, simply do not in themselves create a risk of arbitrary decision-making as would mandate reversal of a death sentence. See e.g., Greer, supra. Here, the prosecutors avoided detailed descriptions of any specific, demonstrable harm to members of Lorraine Martelli's family such as the death of her mother who had relied on Lorraine for care. This elderly woman died within a few weeks of Lorraine's murder and the exclusion of this kind of material from argument correctly anticipated the Booth decision (v. 33, p. 13, ll. 9-19).

Moreover, all of defendant's complaints further are undermined by the latitude given prosecutors to address any subjects relevant to the factors which a jury may consider in determining whether to impose a death sentence or life imprisonment. See Coleman v. Brown, supra; State v. McDonald, 661 S.W. 2d 497, 506 (Mo. banc. 1983). Prosecutors may refer to any circumstances surrounding the events at issue as long as the reference is reasonably supported by the record. Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). Similarly, prosecutors may argue any reasonable inference from the evidence. High v. Kemp, supra, at 995-996 (11th Cir. 1987); Tucker v. Kemp, supra, at 1506.

In evaluating all 23 complaints of prosecutorial misconduct this court must consider the context of the entire trial, the weight of the evidence against defendant, the extent to which prosecutorial comments were invited by the defense, and the extent to which such comments would have engendered juror disapproval of the prosecution's case. See Darden v. Wainwright, supra, at 182. In this regard, there should be no reversal of a death sentence absent a showing that the closing arguments were improper and that it was reasonably probable that the improprieties changed the outcome of the case. Id. Brooks v. Kemp, 762 F.2d 1383, 1402-1403 (11th Cir. 1985). Accord Donnelly v. DeChristoforo, 416 U.S. 637 (1974). This is clearly a two-tiered standard. Arguments which are permissible in the context of a particular case may never be "unconstitutional" no matter how prejudicial. Brooks v. Kemp, supra, at 1403. Thus, a defendant must establish the impropriety of particular comments before this court may even consider whether such comments were sufficient to change the outcome given the weight of the evidence and defendant's admissions that the alleged aggravators were proven. Id. at 1402-1403.

B. Application of Legal Standards to Defendant's Complaints.

Most of the 23 improprieties alleged by defendant and addressed as follows were not improper at all and none, either alone or in combination, constitute a basis for reversing his death sentence:

1. In the first of his 23 specific complaints, defendant alleges that the prosecutors inflamed the jury's emotions through fear of crime, community demands for a death sentence, future dangerousness, sympathy for the victim and her family, defendant's inhumanity and the kind of life he would have in prison. (Opening Brief, pp. 41-42). Defendant cites remarks by Prosecutor Michael Little which referred the jury to the date

of Lorraine Martelli's birthday and the various things she would not be able to do as a result of her death. Id. These remarks also urged the jurors to act as the conscience of the community and to remember their own humanity and emotions in rendering a verdict.

These remarks were proper and did not constitute an excessive emotional appeal which would cause the jury to abandon their reason or objectivity. See Darden v. Wainwright, supra; Coleman v. Brown, supra, at 1239; People v. Williams, supra. Mr. Little's personalizing of Lorraine Martelli's death was proper, Marin, supra, at 1355; Williams v. State, 368 S.E.2d 742 (Ga. 1988), as was his brief contrasting of this victim's fate with a life in prison for defendant. Id. Accord Rice, supra. Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989) (reference to victim's suffering did not render trial unfair). See also Commonwealth v. Travaglia, supra, at 301 (proper to argue defendant should get same sympathy he showed victim). Such rhetoric, intended to insure that a jury does not forget a victim, is proper. See Copeland, supra; Middleton, supra.

Similarly, Mr. Little's appeal to a community conscience also was appropriate. See e.g., Durre, supra; State v. Bell, supra, Robison v. Maynard, supra. Here, Mr. Little prefaced this appeal with a reminder that the prosecution had to establish its case for a death sentence beyond a reasonable doubt (v. 34, pp. 179-180).[2] Mr. Little also

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[2] Instructions 15 and 21 applied the reasonable doubt standard to the ultimate question of whether death was appropriate as well as to the weighing of aggravators and mitigators and thus placed an unnecessary burden on the prosecutor.

Although a footnote in People v. Drake, supra, Rovira J. concurrence/dissent, dealt generally with whether the due process clause required specific standards in the consideration of aggravation and mitigation, several cases stand for the proposition that some form of negation or disproof of mitigation places an impermissible burden on the state. See, State v. Watson, 586 P.2d 1253 (Ariz. 1978) (when issue of guilt has been settled, to require prosecution to negate mitigating circumstances places impermissible burden on state), cert. denied, 440 U.S. 924 (1979); Hulsey v. State, 549 S.W.2d 73 (Ark. 1977) (absence of mitigating circumstances not an element to be proved beyond a reasonable doubt), cert. denied, 439 U.S. 882 (1978); Tichnell v. State, 415 A.2d 830 (Md. 1980) (due process principles "do not require the prosecution to either prove

referred the jury to the overwhelming evidence of aggravating factors and defendant's concession (v. 34, p. 139, ll. 6-11) that these aggravators were proven beyond a reasonable doubt. In this context, his appeal to the jury to be the conscience of the community was a request that they act on the evidence or, more specifically, on conceded proof of "[T]his terrible thing" (v. 34, p. 181, l. 15). This was appropriate as it did not inject irrelevant factors or otherwise implore the jury to abandon their discretion. Marin, supra, at 1355.

Mr. Little properly employed conclusions fairly deduced from the evidence or defense concessions in illustrating what Lorraine Martelli's death would mean in common-sense words and phrases. See e.g., Williams v. State, supra; Marin, supra. Clearly these statements which were not objected to at trial may not be a basis for reversing the death sentence. E.g., Adcox, supra; Stewart, supra.

2. Defendant next alleges that Mr. Silverman argued that defendant should be executed to save tax dollars (Opening Brief, pp. 42-45). This argument unfairly takes Mr. Silverman's remarks out of context and suggests that they were part of an overall scheme to persuade the jury to execute defendant to save money. Mr. Silverman's remark, "Nobody wants to support this man for the rest of his life," (v. 34, p. 113, l. 4) was brief and had little adverse impact given its context. See Tucker v. Kemp, supra,

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beyond a reasonable doubt the absence of mitigating circumstances, or to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstance"), cert. denied, 446 U.S. 993 (1984); State v. Bass, 460 A.2d 214, 221 (N.J. 1983) ("there is no constitutional requirement for the State to prove the insufficiency of such mitigating factors beyond a reasonable doubt"); Parks v. State, 651 P.2d 686 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983) (prosecution's only burden is to prove beyond a reasonable doubt the elements of the crime and any aggravating circumstances); Com. v. Zettlemoyer, 454 A.2d 937 (Pa. 1982), cert. denied, 461 U.S. 970 (1983) (proving elements of the crime and any aggravating circumstances all that is constitutionally required of prosecution).

at 1488. In context, Mr. Silverman clearly was not arguing that an execution would save the taxpayer money. See Bean, supra, 760 P.2d at 1016. Rather, he was arguing that defendant was an incorrigibly violent person who would constitute an imposition on the prison system, particularly upon other less violent prisoners (v. 34, pp. 112-114).

This line of argument, viewed as a whole, did not improperly claim that execution would save money. Id. Rather, it properly focused on defendant's violent character or disposition and how it would burden other inmates or prison guards. See e.g., Campbell v. Kincheloe, supra; Tucker v. Kemp, supra, at 1486; Heishman, supra; Poggi, supra. This was a valid sentencing consideration in determining whether mitigation outweighed aggravation and whether death was ultimately appropriate. See sec. 16-11-103(1)(b), C.R.S. (1986). Moreover, the possibility that defendant, serving consecutive life sentences with no conceivable chances for parole, would not be deterred from assaulting other inmates provided a penological justification for the death penalty in this case that could be argued to the jury. Tucker v. Kemp, supra, at 1484-1486; Campbell v. Kincheloe, supra, at 1457-1468, see also Brooks v. Kemp, supra, at 1497 (prosecutor may argue that defendant is so dangerous that incapacitation by death is warranted); Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (proper to argue incapacitating effect of death).

Later remarks by Mr. Silverman about "free food" and other amenities of prison life (Opening Brief, p. 42) similarly were not an appeal to save money. These remarks were disconnected from the earlier remark about supporting defendant. In context, these comments simply argued that the penitentiary was a "home" for defendant where he was able to adapt and be comfortable (v. 34, p. 118, ll. 4-23) and they were not an improper plea to save money. See Bean, supra, 760 P.2d at 1016 (isolated references to financial considerations not error when overall argument goes to other factors). Rather, these

remarks were relevant to the punitive and deterrent effects of life imprisonment upon an offender who had contemplated murder when he already faced life imprisonment for lesser felonies against the contemplated murder victim. The evidence showed that defendant did engage in such a weighing process. Thus, comments about prison life simply related to the argument that imprisonment was hardly a deterrent to a defendant already facing a natural life term for the lesser felonies committed against Lorraine Martelli before the murder. See Coleman, supra, at 1239 (punishment or retributive effect of death penalty may be considered and argued along with general deterrent effect). These comments did not call for any speculative inquiry into prison conditions, see Tucker v. Kemp, supra, at 1486, and represented a permissible contrasting of life imprisonment with the fate of the victim. Williams v. State, supra.

3. Next, defendant cites Mr. Little's references to his Exhibit 38 entitled, "The Life of Frank D. Rodriguez" (Opening Brief, pp. 45-46). Defendant claims that Mr. Little was attempting to denigrate the value of this exhibit by calling it "hearsay." However, when viewed in full context, it was apparent that Mr. Little's remarks were intended to have an entirely different effect (v. 34, pp. 173-175). Mr. Little was responding to a defense argument that before the present trial, Judy Archuleta had not said that defendant threatened to kill her and her baby. Mr. Little argued that prior statements by Mrs. Archuleta to this effect were contained in defendant's Exhibit 38 and that the jury should therefore give this exhibit appropriate weight. Id. This was clearly an appropriate "measured response to an asserted line of defense" which suggested that Judy Archuleta concocted defendant's threats for the penalty phase of this trial. See Kirkpatrick v. Blackburn, 777 F.2d 272 (5th Cir. 1985). Certainly, a prosecutor may discuss or criticize defense evidence presented during a penalty phase. See

Commonwealth v. Yarris, 549 A.2d 513 (Pa. 1988). Moreover, there are significant differences between the kind of evidence admissible in guilt and penalty phases, State v. Jones, 749 S.W. 2d 356 (Mo. banc. 1988), and argument not permissible in the former may be highly relevant at the latter. See State v. Antwine, 743 S.W.2d 51 (Mo. 1987). Accordingly, Mr. Little's brief comments about these differences were not improper.

4. Defendant cites the prosecutors' concerns about unsafe streets and innocent people being taken hostage, tortured, and killed (Opening Brief, pp. 47-48). First, Lorraine Martelli was an innocent victim, taken off the streets at random to be tortured and killed. Evidence of these facts was overwhelming and undisputed and such argument therefore was proper. See High v. Kemp, supra; Mann v. Dugger, supra. Similarly, the prosecutors properly expressed concern for community safety and protection from violent crime, e.g., Davis v. Kemp, supra, at 1527-1528; see also Clemmons, supra, (concern for "murder and mayhem" on streets of our city not improper). These remarks which were not objected to at trial, clearly are not grounds for reversal. E.g., Adcox, supra.

5. Next, defendant cites Mr. Little's remarks that justice has been "terribly offended" and his characterization of the death penalty as that "last fall-back position of a free society" (Opening Brief, p. 48 erroneously enumerated as "4" by defendant). Standing alone, these comments were not improper. See State v. Eaton, 524 So. 2d 1194 (La. 1988) (no reversible error in referring to death penalty as societal act of self defense), Davis v. Kemp, supra, at 1527 (death penalty can be compared with national defense in war). Moreover, in context, these remarks were part of the People's overall argument that defendant already faced life imprisonment for the rape, robbery, and kidnap of his victim and that mere life imprisonment for her murder would be unjust (v. 34, pp. 182, 183). This argument thus constituted proper comment upon penological

justifications for the application of the death penalty in this case, e.g., Coleman v. Brown, supra, at 1234, and proper comment upon evidence that defendant killed Miss Martelli to avoid lengthy re-imprisonment. E.g., High v. Kemp, supra.

6. Next, defendant alleges that Mr. Silverman said the defendant could be paroled in 20 years (Opening Brief, p. 49). Again, a view of the statement in context shows no impropriety. Mr. Silverman said the trial judge could put defendant "away for the rest of his life" or that he could be sentenced so as to become "parole eligible in twenty years" (v. 34, p. 113, ll. 8-19). Parole eligibility in 20 years legally was possible, see sec. 17-22.5-104(b), C.R.S. (1986), and defendant admitted as much in his closing argument (v. 34, p. 132, ll. 2-3). Section 16-11-103(1)(b) specifically provides that juries shall be informed that life imprisonment allows for parole eligibility in 20 years. In any event, Mr. Silverman did not argue that parole eligibility in 20 years was a realistic possibility (v. 34, pp. 113-114, 131, 132). Rather, he told the jurors that their choice was either the death penalty or death from "natural causes in jail 50 years from now" (v. 34, p. 113, ll. 15-24). Mr. Silverman further stated that these were the "only" options (id.) and thus he cannot be accused of arguing the prospect of parole in 20 years. Rather, his statements were fair and proper and cannot conceivably be grounds for reversal given defendant's failure to object. E.g., Adcox, supra, Wilson, supra.

7. Defendant next complains about Mr. Silverman's statements that defendant was a sick and dangerous man with a propensity and desire for violence. Defendant also complains about arguments that he would escape or be dangerous in the future (Opening Brief, pp. 50-52). These arguments were supported by the evidence, specifically defendant's boasts about escaping in his correspondence (see Appendix A) and his life history which showed gang activity and the burning of another inmate's cell. See

defendant's Exhibit 38, pp. 13-15. Accordingly, arguments regarding his future dangerousness were proper. E.g., Campbell v. Kincheloe, supra;, Tucker v. Kemp, supra, at 1486; Lucky, supra; Poggi, supra;, Heishman, supra. To the extent that such arguments were made by Mr. Little on rebuttal, they again constituted an entirely appropriate response to defendant's argument that he would "never again be in a position to harm anyone" (v. 34, p. 56, l. 2). See Kirkpatrick v. Blackburn, supra; Dyer, supra. Moreover, to the extent that any such remarks were outside the parameters set by the trial court, defendant's objections were sustained, thus precluding any prejudice. See People v. McKnight, 39 Colo. App. 280, 567 P.2d 811 (1977).

8. Defendant cites Mr. Silverman's appeals to women on the jury to be strong and "recognize the continuing threat to women and to other people that this defendant poses." However, defendant's objection to this line of argument was sustained and Mr. Silverman was warned that he was digressing (Opening Brief, p. 53). Such warnings, in the jury's presence, afforded defendant a remedy. People v. Harris, 633 P.2d 1095 (Colo. App. 1981). Moreover, other than the trial court's viewing of these remarks as an unnecessary digression, they were not improper. First, prosecutor may urge jurors to be strong or tough by returning a death verdict. Kenley v. State, 759 S.W. 2d 340 (Mo. App. 1988). In so doing, prosecutors may comment on the threats presented by violent crimes if jurors lack the strength to return such a verdict. Id. Such remarks generally are proper prosecutorial comment on the need to deter violent crime. Id. Second, the fact that Mr. Silverman addressed such remarks to the women on the jury or spoke of threats to women is not grounds for reversal. See Heishman, supra, 753 P.2d at 661-662. Convicted murderers who have shown an ability to influence or manipulate others may continue to do so while incarcerated, see Heishman, supra, and thus may constitute a

threat to women through those they influence. Moreover, the prosecutors' overall argument suggested that the lack of a credible death penalty encourages previously convicted felons such as defendant to murder persons whom they rape. Such murders, like the one in this case, are intended to reduce the chances of apprehension without increasing the effective life terms which would apply to such felons upon conviction for rape. In this context, Mr. Silverman properly could argue that only a death sentence could nullify the continuing threat to women presented by crimes such as those committed here. Heishman, supra, at 662. See also Brooks v. Kemp, supra, at 1412 (legitimate future dangerousness argument not rendered improper merely because prosecutor refers to future victims); Davis v. Kemp, supra, at 1529 (same). In addition, the prospect of defendant fulfilling his boasts and actually escaping was not utterly impossible, particularly if he was removed from death-row and allowed to progress to less-secure confinement. See Tucker v. Kemp.

9. Defendant complains about the prosecutor's remarks concerning his status in prison, his intentions of selling drugs in prison, his membership in a prison gang, his animosity for other races, his ability to adapt to prison life, his ability to lead or influence other inmates, and the possibility that he would sexually assault other persons in prison. These comments were supported by the evidence including defendant's own exhibit on his life history. (Exhibit 38, pp. 13-15).

Moreover, testimony by a defense witness raised the issue of defendant's ability to lead or influence other criminals (v. 34, pp. 35-36, p. 51, ll. 5-15). This "leadership issue" was identical to the issue of future dangerousness because all the criminal episodes presented at trial suggested that defendant could lead or influence others in the commission of serious crimes by being the most violent or domineering participant.

Defendant also argued that by being imprisoned for life he "will never again be in a position to harm anyone" (v. 34, p. 167, l. 2). Thus, defendant opened the door to prosecutorial comment on his ability to endanger others particularly through a leadership role in murder or sexual assault of the type established here. See e.g., Dyer, supra. See also Kirkpatrick v. Blackburn, supra (prosecution's measured response to defendant's claims not basis for reversal).

Defendant's correspondence showed animosity toward blacks, whites, and homosexuals. (See Appendix A). Testimony of Margie Marquez as well as defendant's correspondence showed defendant's intentions to profit through drug trafficking inside prison (v. 29, pp. 96-97, 145-147, Appendix A). Thus, prosecutors could draw reasonable inferences from this evidence and argue that defendant was a leader of criminals who would participate in gang and drug related activities and generally constitute a threat to the safety of other persons inside prisons. See e.g., High v. Kemp, supra; at 995-96, Tucker v. Kemp, supra, at 1486; Poggi, supra; Heishman, supra. Moreover, given the general knowledge concerning the prevalence of sexual assaults in prison and defendant's proven participation in gang rapes outside prison, the prosecutors could properly argue that defendant could force sex on other prisoners. Poggi, supra, at 1101 (proper for prosecutor to argue that defendant, by virtue of his violent disposition, would be raping others in institution); Tucker v. Kemp, supra, at 1486 (prosecutor could argue that defendant's perverted sexual habits would continue in prison), see also State v. McDonald, supra, (prosecutor may refer juries to matters of general knowledge not supported by evidence in record); State v. Hampton, 653 S.W. 2d 191 (Mo. banc. 1983) (same); People v. Motley, 179 Colo. 77, 498 P.2d 339 (1972) (no reversible error in arguing matter of common sense not supported by record). Again, these remarks all

were relevant to the People's argument that life imprisonment was neither a deterrent nor a punishment for a defendant who faced almost certain confinement for the rest of his life for crimes committed shortly before he decided to kill Lorraine Martelli. See e.g., Davis v. Kemp, supra (prosecutor may argue that ends of deterrence and retribution are served by death penalty in a particular case). In any event, they are not grounds for reversal given defendant's lack of objections. E.g., Poggi, supra, at 1101-1102; Wilson, supra.

10. The prosecutors' references to statutes passed by elected officials, to jurors being "drafted" or acting as members of the community, and to the importance of the verdict to the community, are cited as misconduct. However, such references were proper. See e.g., Robison v. Maynard, supra; Lester, supra; Durre, supra. In context, these remarks properly emphasized the importance of the jury's decision and the importance of following the law in the instructions (v. 34, pp. 97-98, 168-170), and they would not be grounds for overturning the verdict. See People v. Sepeda, 196 Colo. 13, 581 P.2d 723 (1978).

Mr. Little's references to jurors being "drafted" and to a "battlefield" (v. 34, pp. 169-170) similarly were not improper because analogies between the death penalty and killing in war are appropriate: each serves a compelling state interest, specifically, deterring murder and preserving national security. Davis v. Kemp, supra, at 1527. In any event, these remarks were not particularly egregious, Id., and may not be grounds for reversal in the absence of an objection. Wilson, supra.

11. Defendant alleges that the prosecutors attempted to inflame the passions of the jury by referring to the victim and her family, and more specifically by stating how the victim and her family had neither the chance to say "good-by" to one another nor

the opportunity to write to one another. There was no prosecutorial misconduct here. See e.g., Rice, supra; Williams v. State, supra. The references were proper efforts at personalizing the death of the victim, id., Marin, supra, and, they had nowhere near the effect of the detailed victim-impact statement submitted to the jury in Booth, supra. See e.g., Greer, supra;, Dyer, supra.

12. Mr. Silverman's remarks that only a rare combination of factors satisfies so many of the statutory criteria for a death sentence and his remarks that this was a worse than average crime by a worse than average killer are cited as misconduct. However, Mr. Silverman did not preface his remarks with any statement of personal belief or opinion or otherwise attempt to suggest personal knowledge not available to the jury which established that defendant was uniquely deserving of a death sentence. See State v. Newton, 627 S.W.2d 606 (Mo. banc. 1982). Compare Tucker v. Kemp, supra, at 1484-1485; Brooks v. Kemp, supra. In context, these remarks are nothing more than a means of stating that the circumstances of the present case were sufficient to establish the aggravators beyond a reasonable doubt and thus separate this murder from those ordinary killings which do not warrant a sentence of death. See People v. McGill, 190 Colo. 443, 548 P.2d 600 (1976) (taken in context, prosecutor's allegedly improper expressions of personal belief were merely a way of stating that People met their burden of proof). Obviously, sec. 16-11-103, C.R.S. (1986) represents a legislative determination that the death penalty is warranted only in certain narrowly-defined aggravated circumstances. Accord, People v. Drake, 748 P.2d 1237 (Colo. 1988). Thus, it was not improper for the prosecution to argue that this case was one of those unusual situations. Greer, supra.

13. Defendant complains that Mr. Silverman improperly appealed to jurors to put themselves in the victim's place and imagine the discomfort of being anally raped. First, such appeals to stand in the victim's shoes are proper. Rice, supra. Second, these remarks constituted a reasonable inference from the evidence that a defendant who previously took pleasure in subjecting others to anal rape could do so in the future. See Tucker v. Kemp, supra, at 1486 (prior heterosexual assault proper basis for arguing that defendant's perversity would continue in prison). As noted above, it was not improper to have the jury contemplate future sexual assaults in prison by a violent felon who previously subjected others to gang rapes. Id. See Poggi, supra, at 1101. In any event, these comments, not objected to below, may not be grounds for reversal. Id.; Wilson, supra.

14. Defendant complains about the prosecutor's comments upon the similar transaction evidence of his violence against George Stapleton and Judy Archuleta. However, these comments largely were proper references to similar transaction evidence which showed plan, scheme, design, method of operation, motive, guilty knowledge or intent. Cf. Pigford v. People, 197 Colo. 358, 593 P.2d 354 (1979); People v. Moen, 186 Colo. 196, 526 P.2d 654 (1974). Mr. Little specifically referred to the Archuleta and Stapleton incidents in the context of how they showed defendant's intent and motives in trying to kill witnesses to lesser crimes, a specific statutory aggravator in this case (v. 34, pp. 170-171). Similarly, Mr. Silverman's references to the Stapleton shooting in the context of defendant settling "back into jail life" or getting more "time in jail" related to the People's argument that life imprisonment did not sufficiently deter defendant from killing witnesses because his motive in killing was that of avoiding effective life terms for lesser felonies (v. 34, pp. 116-117, p. 123, ll. 7-17). Finally, Mr. Silverman's

references to defendant being on parole for the crimes against Judy Archuleta properly supported the statutory aggravator of being under sentence for a previous felony. Lucero v. People, No. 87 SC 455 (Colo. April 10, 1989); sec. 16-11-103(6)(a), C.R.S. (1986).

Only Mr. Silverman's mentioning of the Stapleton incident in the context of how defendant killed in a cruel and heinous manner or had a violent character arguably was improper (v. 34, pp. 111-112). However, the trial court specifically held that defendant's character was relevant and admissible under sec. 16-11-103(1)(b) (v. 11, pp. 173-179). The trial court also held that specific instances of conduct such as the shooting of George Stapleton would be admissible to show defendant's character (v. 11, p. 181, ll. 20-25). These holdings represent a correct interpretation of legislative intent in enacting sec. 16-11-103(1)(b). See e.g., Borrego, supra; Schubert v. People, 698 P.2d 788 (Colo. 1985).[3] Such specific instances of conduct found to be relevant by a trial court are valid death sentencing considerations under sec. 16-11-103(1)(b), Borrego, supra, and relate to the question of whether mitigating evidence is sufficient to outweigh aggravating evidence. See sec. 16-11-103(2)(a), C.R.S. (1986). Any other construction of sec. 16-11-103(1)(b) would render it inoperative and defeat the intent of the legislature in enacting this provision. See Olinyk v. People, 642 P.2d 490 (Colo. 1982). Moreover, defendant's mitigating factors included much evidence of his character and background and thus the prosecutor could comment on his character through reference to specific instances. See Kirkpatrick v. Blackburn, supra. Thus, mention of the Stapleton shooting in the context of defendant's violent character hardly was reversible error, particularly in

[3]Schubert, supra, holds that courts must look at the problem addressed by the General Assembly to discern legislative intent. Here, testimony of a legislator who sponsored sec. 16-11-103(1)(b) established that the problem addressed by this section was that of overly restrictive prohibitions on the introduction of character and background evidence (v. 10, pp. 3-14).

the absence of any objection. E.g., Adcox, supra. Indeed, neither this particular comment nor any of the remaining instances of alleged misconduct were objected to below.

15. Defendant complains that Mr. Silverman argued that his execution by lethal gas would be humane (Opening Brief, pp. 67-68). In context, Mr. Silverman's remarks were simply that any execution would be humane as possible particularly when compared with the "terrible and gruesome death" suffered by Lorraine Martelli (v. 34, pp. 110-111). Mr. Silverman also remarked how, unlike a murder victim, a condemned prisoner is permitted to write letters, have visits, a last meal, and a chance to seek spiritual peace (v. 34, pp. 110-111). Such contrasting of a defendant's fate with that of his victim is not an excessive use of emotion by the prosecutor. See Williams v. State, supra; Rice, supra; accord Marin, supra, at 1355.

16. Defendant argues that Mr. Silverman's remarks suggested that "hanging was too good for him" and called for pure revenge and retribution (Opening Brief, p. 68). However, retribution is a permissible subject for prosecutorial comment. E.g., Davis v. Kemp, supra; State v. Walker, 327 S.E.2d 475, 484-85 (Ga. 1985). Furthermore, in context, Mr. Silverman simply emphasized that retribution may not exceed legal bounds (v. 34, pp. 110-111). As such, his remarks contrasted sharply with the improper suggestions in Darden v. Wainwright, supra, that an extra-legal death for the defendant would have been just.

17. Defendant again complains about statements that he would run a drug business in prison or be a member of a gang. As indicated in instance 9 above, such statements were permissible inferences supported by the evidence. See High v. Kemp, supra. Defendant also complains that Mr. Silverman gave "testimony" about the niceties

of prison life (Opening Brief, pp. 68-69). Again, in context, these remarks were fair and proper comments relevant to the insufficient deterrent effect of life imprisonment upon a defendant already facing life imprisonment before his deliberate act of murder. See Davis v. Kemp, supra. See also Heishman, supra, at 663 (prosecutor could argue what return to prison life would mean to defendant). Moreover, these remarks related to matters of common knowledge and did not call for "speculative inquiry" into prison conditions. Tucker v. Kemp, supra, at 1486.

18. Defendant complains about the following statement by Mr. Silverman:

> And, besides, even if he does get caught, the worst thing the defendant figures could happen to him is the same thing, life in jail; nobody gets the death penalty in Colorado; the inmates at Canon City know that.
>
> The defendant figured he could count on that . . . (v. 34, p. 122).

According to defendant, this statement was unsupported by the evidence and diminished the jury's sense of responsibility for a death sentence. See Caldwell v. Mississippi, 472 U.S. 320 (1985). The context of Mr. Silverman's argument as well as the context of trial believe these claims. See Darden v. Wainwright, supra. Defendant's own arguments support the assertion that, as a practical matter, he faced life in prison for felonies other than first degree murder (v. 34, pp. 132, ll. 9-23). Defendant argued that he was vulnerable to a consecutive life term on each of the felonies of which he was convicted (Id.)

Furthermore, Mr. Silverman's statement that convicts knew that "nobody" would ever be executed in Colorado was not improper. In context, this statement was a means of describing defendant's state of mind when he decided to kill Lorraine Martelli. Relevant evidence, particularly Exhibits Q-1, Q-2, and Q-3 (admitted v. 28, p. 68, ll. 8-9),

supported the inference that defendant believed he would return to prison for a very long time if he did not kill this victim. Thus, it was permissible to argue that he weighed what he believed to be a very remote possibility of a death sentence against a virtually certain life term for rape, robbery and kidnapping by an habitual offender. Cf. Heishman, supra, at 642-643 (proper to show that defendant killed to avoid return to prison).

Moreover, juries may use their common sense to draw reasonable inferences from the evidence, High v. Kemp, supra; Marin, supra, and arguments which seek such common sense deductions are not improper even if they direct the jury to some matter of common knowledge outside the record. See Hampton, supra; McDonald, supra. Here, the claim that experienced convicts know that an execution is a very remote possibility is a reasonable appeal to common knowledge of the fact that there has not been an execution in this state for approximately two decades. See Drake, supra; Durre, supra; People v. District Court, 196 Colo. 401, 586 P.2d 31 (1978); Monge v. People, 158 Colo. 224, 406 P.2d 674 (1965).

Moreover, this argument was presented in a context which increased rather than diminished the jury's sense of responsibility. Mr. Silverman also stated:

> The defendant figured he could count on that. This defendant figured there was no down side in killing Lorraine Martelli; no down side at all; he had a life sentence either way, and, with the second option he stands a much less chance of ever getting caught for that crime. But the defendant figures wrong, ladies and gentleman. The defendant was undeterred by the death penalty because he thought no jury would ever give it to him. But the People submit that you are the jury: You are the jury that will declare that there are sentences worse than life in Canon City.

(v. 34, pp. 122-123) (emphasis added).

This emphasized that if defendant believed that nobody got the death penalty it was because a jury would not give it. It did not make the slightest suggestion that an appellate court or the Governor would nullify a jury's decision to put someone to death or otherwise diminish the finality of a verdict of this kind. Thus, there was no "Caldwell error": The statement did not impermissibly dilute the juror's sense of responsibility for their decision. Parks v. Brown, 860 F.2d 1545, 1549-52 (10th Cir. 1988); accord In Re Jeffries, 752 P.2d 1338 (Wash. 1988).

Defendant argues that a remark by Mr. Little, "it's up to the Judge," had a similar diminishing effect on the jury's sense of final responsibility (Opening Brief, p. 70). In context, Mr. Little talked about the jury's role in a manner which could not have possibly diminished their responsibility (v. 34, pp. 168-169), compare Parks v. Brown, supra. In fact, Mr. Little compared the role of each juror to that of a former President whose personal motto was "the buck stops here" (v. 34, p. 169, ll. 11-17). Clearly, this increased rather than diminished the jury's sense of responsibility for the ultimate life or death decision.

19. Next, defendant complains that Mr. Silverman argued that defendant lacked humanity or other redeeming qualities. However, these comments were not unfair inferences given the evidence, particularly defendant's correspondence. See High v. Kemp, supra. While defendant's motives in writing some of these letters were disputed, the fact that they graphically represented his thoughts cannot be contested. Among other things, defendant wrote:

> I don't care about (Lorraine) Martelli or her people but I do care what you (Margie Marquez) think about me. I love you women and don't want to loss you over some white people.
>
> (Exhibit Q-2, supra).

> The lady had to die or she would of told the man all about me and they were already looking for me for that shooting of the white man. Damn, I shot that white dude 5 times, only 3 hit him in the face and the puck [sic] didn't die. You see if luck was with me that day that man would have died and today wouldn't be going to court on me.
>
> But sweetheart as far as that Martelli case I had to kill her and even if I am sorry about it now it isn't going to change anything . . . .

(Exhibit Q-3 identified, v. 28, pp. 61-62, admitted p. 68, ll. 8-9). Other correspondence contains contemptuous references to "fags" and "niggers." (See Appendix A.)

Such graphic representations of defendant's thought processes support Mr. Silverman's arguments that defendant had no concern for anyone but himself and that he lacked redeeming qualities. See Coleman v. Brown, supra, at 1238 (graphic remarks permissible where supported by evidence). Such argument was relevant to the question of whether mitigation, based largely upon defendant's character and background, outweighed aggravation. See secs. 16-11-103(1)(b) and (2)(a)(II). Similarly, such argument fell far short of the emotionalism used in Darden v. Wainwright, supra, and remained within acceptable bounds. See Coleman v. Brown, supra, at 1237-1242; Brooks v. Kemp, 762 F.2d at 1413 (prosecutor's description of defendant as a "cancer on the body of society" not improper); People v. Green, 454 N.E.2d 792 (Ill. App. 1983) (terms "lowest form of human being" and "animal," not reversible error).

20. Next, defendant complains about Mr. Silverman's remarks that "every so often in his adult life this defendant has been on a leash on the streets of Denver" (Opening Brief, p. 20). In context, Mr. Silverman was discussing defendant's criminal history, his repeated pattern of conviction, incarceration, and parole, thus suggesting that his parole status was a "leash" which would readily bring him back into confinement if any

subsequent crimes were discovered (v. 34, pp. 119-122). Thus, there was no reversible error. Darden v. Wainwright, supra, Brooks v. Kemp, supra.

21. Defendant next complains that Mr. Silverman suggested that he was cruel, heinous and depraved (Opening Brief, p. 71). Such remarks were fair comments on evidence which showed 28 serious stab wounds plus torture cuts around the victim's throat and chin, broken cartilage, extensive facial bruising, and vaginal and anal injury. E.g., High v. Kemp, supra. In context, these remarks were directed at what defendant did to Lorraine Martelli (v. 34, pp. 111-112). However, even if these remarks somehow suggested that defendant generally was capable of cruelty, such argument sufficiently was based in the evidence and was relevant to the question of whether mitigation, including aspects of character, outweighed aggravation. See secs. 16-11-103(1)(b) and (2)(a)(II). Thus, Mr. Silverman never "misstated the law" as alleged by defendant.

22. Defendant complains that both prosecutors stated that in this country people can succeed if they are honest and hard-working. Defendant also complains that Abraham Lincoln, Babe Ruth and Martin Luther King were mentioned as persons who overcame poverty. These remarks simply expressed the proposition that poverty is no excuse for murder. They addressed defendant's mitigating evidence, particularly the suggestion that his background offset the admitted aggravating factors, and therefore were proper. See Kirkpatrick v. Blackburn, supra. See also Motley, supra, (prosecutor's appeal to common knowledge or common sense regarding matters not of record not reversible error).

23. Finally, defendant complains of Mr. Little's use of the colloquial "con" (Opening Brief, p. 72). Mr. Little's first use of this word was in the context of defendant's ability to adapt to prison life and threaten others inside penal facilities (v.

34, p. 182, l. 6). As such it was proper. See Heishman, supra, at 663. Mr. Little's next use of the verb "con" (v. 34, p. 183, l. 7) related to how defendant weighed the consequences of letting Lorraine Martelli go and receiving life imprisonment against those of killing her and receiving life imprisonment if he were proven to be the murderer. In this regard, Mr. Little argued that in deciding to kill Lorraine Martelli, defendant either was unaware of the death penalty or thought he could "con" the jury out of applying it (v. 34, p. 183, ll. 5-9). This argument was proper. The use of a colorful, colloquial term such as "con" instead of a sterile antiseptic term such as "persuade" was not improper, see Coleman v. Brown, supra; Marin, supra. See People v. Ferrell, 613 P.2d 324 (Colo. 1981). This is particularly is true because this was penalty phase argument and not argument in a guilt trial on charges involving fraud or deceit. See Antwine, supra. Compare People v. Mason, 643 P.2d 745 (Colo. 1982) (prosecutor used term "con-man" to describe defendant charged with fraud by check).

C. Summation

None of the 23 allegations either alone or cumulatively constituted misconduct which would necessitate any further analysis by this court. Darden v. Wainwright, supra. Defendant's complaints go largely to the permissible prejudicial effects of the prosecutors arguments and ignore the principle that while "foul blows" are impermissible, "hard blows" are allowed. Berger v. United States, 295 U.S. 78 (1935). Here, the evidence established both cold, calculating killing to avoid a forseeable detriment, and almost incomprehensible cruelty and brutality. Given such evidence, prosecutorial comment was not unjustifiably graphic or hard-hitting; there was no "misplaced zeal to win the case," only a conscientious effort to vindicate the public interest in punishing and deterring extremely violent killing. See Tamme, supra; Marin, supra, at 1355-1357. Thus, there

was no egregious prosecutorial misconduct of the kind which would warrant exercise of this court's supervisory authority. See People v. Terry, 720 P.2d 125 (Colo. 1986).

Moreover, even if serious misconduct is perceived by this court, the closing arguments did not infect the trial with such unfairness as to make the result a denial of due process. Darden v. Wainwright, supra. Six separate aggravating factors were established and defendant effectively admitted that these aggravators were proven beyond a reasonable doubt (v. 34, p. 139, ll. 6-11). Indeed, rather than challenge the existence of these aggravators, defendant simply disputed whether it was he or his accomplice, David Martinez, who stabbed Miss Martelli to death. To the extent that defendant's strategy was largely that of evaluating the roles of the participants in this episode, see sec. 16-11-103(5)(d), the alleged improprieties of the prosecutors could not have affected the outcome as they simply did not focus on this issue. Id. Rather, defendant's claim that David Martinez stabbed the victim amply was refuted by the testimony of Patricia Thomas and medical examination of the victim's wounds. Indeed, the verdict reflects a reasoned weighing of evidence, as reflected by the jury's finding reasonable doubt as to the alleged aggravator regarding pecuniary gain. However, the other six aggravators were supported by both substantial evidence and defendant's admissions and they provide unassailable support for the jury's conclusion that mitigation did not outweigh aggravation and that death was the appropriate penalty. Thus, it is clear that any impropriety simply was insufficient to affect the outcome or otherwise deny any constitutional right. Id. See Brooks v. Kemp, supra.

II. THE JURY WAS NOT INSTRUCTED THAT IT HAD TO UNANIMOUSLY AGREE ON A MITIGATING FACTOR BEFORE ANY JUROR COULD CONSIDER THAT FACTOR. DEFENDANT'S CLAIMS IN THIS REGARD ARE ENTIRELY SPECULATIVE. INDEED, THE INSTRUCTIONS TAKEN AS A WHOLE ALONG WITH ARGUMENTS OF COUNSEL CLEARLY

INFORMED EACH JUROR THAT HE OR SHE INDIVIDUALLY COULD RELY ON ANY FACTOR TO RETURN A LIFE SENTENCE AND THAT UNANIMITY WAS NOT NECESSARY IN THIS REGARD.

Defendant complains that the jury was instructed that it had to unanimously agree as to the proof of any mitigating factor before any such mitigator could be weighed against established aggravators. This argument lacks merit.

In analyzing this issue this court must focus on what the instructions could have meant to a reasonable juror. California v. Brown, 479 U.S. 538, 541 (1987). Accord, Mills v. Maryland, 100 L.Ed.2d 384, 394 (1988). The relevant inquiry is not "whether an impermissible interpretation of instructions to the jury, however improbable, is literally possible," Id. at 402-403 (Rehnquist, C.J. dissenting), but whether, when taken as a whole, the instructions are adequate to sufficiently advise the jury of their duties. E.g., United States v. Hoffner, 777 F.2d 1423 (10th Cir. 1985); People v. Travis, 192 Colo. 169, 558 P.2d 579 (1976); People v. Manier, 184 Colo. 44, 518 P.2d 811 (1974); People v. Kurts, 721 P.2d 1201 (Colo. App. 1986). Here, there was no possibility much less a probability that some reasonable juror would have believed that he or she could not weigh or consider mitigating evidence without the concurrence of every other juror. Indeed, not even instruction number 21, cited by defendant as the principal cause of the alleged problem, requires agreement by all 12 jurors before any mitigation may be considered by a single juror. In this regard, Mills v. Maryland does not prohibit a unanimous declaration by a jury that a claimed mitigator does not exist. Id. at 394-495. Rather, it condemns only those situations where instructions will prevent the weighing of mitigation because one juror may doubt that such mitigation exists. Id. Such a situation was not created by instruction 21 which stated:

If in the first two steps of your deliberations you have made unanimous findings that the prosecution has proven beyond a reasonable doubt that one or more aggravating factors exists, and that no mitigating factors exist, or that a mitigating factor or factors exist, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the aggravating factors or factors.

In the third step of your deliberations you must weigh the aggravating factor or factors found to exist against any and all mitigating factors. This is not a mere counting process in which aggravating factors are weighed against mitigating factors. Rather, it is a process in which you must apply your reasoned judgment in deciding whether the situation calls for life imprisonment or requires the imposition of the death penalty, in light of the totality of the circumstances present.

The number of factors found is not determinative. The jury may emphasize one factor more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating factors in making this determination.

Your deliberations during this step of the proceeding can lead to one of three results:

1. If one or more of the jurors believe that a mitigating factor or factors outweigh the aggravating factor or factors found to exist, then the jury shall enter a verdict of life imprisonment.

2. If all jurors unanimously agree that a mitigating factor or factors outweigh the aggravating factor or factors found to exist, then the jury shall enter a verdict of life imprisonment.

3. If all jurors unanimously agree that there are no mitigating factors or there are not sufficient mitigating factors that outweigh the aggravating factor or factors found to exist, then the jury shall determine if death is the appropriate punishment in this case.

This instruction, when taken in its entirety would not have caused a reasonable juror to believe that a unanimous finding regarding the existence of mitigation was a prerequisite to weighing "any factor in mitigation" against aggravation. Indeed, not even

the first paragraph upon which defendant focuses his complaints supports such an interpretation. This paragraph undoubtedly could have been better drafted, particularly with hindsight subsequent to the 1988 decision in Mills v. Maryland. However, it nonetheless puts the burden on the prosecution to disprove mitigators to a unanimous jury before such mitigators may not be weighed against aggravators. Such is the clear meaning of this paragraph and unanimous agreement by a jury that the prosecution has disproven a mitigator beyond a reasonable doubt does not offend Mills v. Maryland. This requirement of unanimity as to the absence of any mitigator by itself insures that any mitigator found to exist by any one juror would be weighed against aggravators.

Next, this paragraph allows the jury to unanimously find that mitigators exist but it does not require them to do so before weighing "any factors in mitigation" against aggravators. This again does not offend Mills for two reasons. First, there is certainly no prejudice to a defendant in having a jury unanimously declare that a particular mitigator exists. Presumably, such a unanimous declaration will only increase the weight such a mitigator will carry when balanced against aggravators. Second, regardless of any confusion created by the language allowing jurors to unanimously find mitigation, there is no unanimity prerequisite for the balancing of "any factors" in mitigation against aggravation. Indeed, instruction 21 calls for such a weighing process even if the prosecution has proven to a unanimous jury that certain mitigating factors do not exist. This is consistent with Mills, supra, and this portion of the instruction certainly is not a "barrier to the jury's full consideration of mitigating evidence." See Franklin v. Lynaugh, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

Finally, the remaining paragraphs of instruction 21 clearly dispel any lingering belief that mitigating evidence must be "found to exist" by a unanimous jury before it

may be balanced against aggravation. These paragraphs make it clear that only aggravators are subject to such finding requirements, and that any mitigating factor may be used by a single juror to prevent a death sentence. This fully complied with Mills, supra, and no additional instructions restating a lone juror's authority to prevent a death sentence were necessary. See Franklin v. Lynaugh, supra. This is particularly true because at trial defendant raised no specific objection to instruction 21 on the grounds raised here (v. 34, p. 85, ll. 11-16). Thus, the trial court was not obliged to re-write instruction 21 or to give other directives on this subject of juror unanimity which was adequately addressed by this and other instructions. See e.g., People v. Mackey, 185 Colo. 24, 32-33, 521 P.2d 910 (1974).

Rather than reinforce any alleged unanimity requirement established by instruction 21, the other instructions, taken as a whole, served to dispel any lingering doubt about whether a single juror could consider mitigation without the specific consent of the other

11. For instance:

Instruction 11 states:

> A mitigating factor does not have to be proved by any burden of proof. You must find that a mitigating factor exists if there is any evidence to support it.

Instruction 15 subjects aggravators to a unanimity requirement but then states:

> If one or more jurors finds sufficient mitigating factors exist that outweigh a specified aggravating factor or factors then the result is a sentence of life imprisonment.

(Emphasis added.)

Instruction 22 states:

> Each of you must also decide for yourself what weight to give each mitigating circumstanced that you find exists. Your decision as to what weight to give any mitigating circumstances does not have to be unanimous. You do not

> have to take the decisions, opinions or feelings of any other juror into account although you may do so if you wish.

(Emphasis added.)

This last instruction was addressed not to the jury as a whole but to each individual juror. It allowed any individual jury to find that a mitigator existed and to afford that mitigator appropriate weight regardless of the opinions of other jurors.

Accordingly, defense counsel gave the following argument:

> You [jurors] have to decide whether or not the mitigating factor as to the punishment the other people received in this case, how much those are worth in comparison to these aggravating factors, and if you don't like the factors the court has given to you, if you think there are other factors that you think justify a life sentence, then you can rely upon those factors. Each and everyone of you individually can rely on any factor you wish to return a life sentence. You don't have to be unanimous on those factors.

(v. 34, p. 140, ll. 13-21) (emphasis added).

Defendant also argued

> It doesn't matter none of your fellow jurors agree with you. You can have eleven jurors coming out the other way, but if you believe the death sentence is wrong, you have a responsibility to stick to your guns and insist on a sentence of life imprisonment.

(v. 34, p. 160, ll. 2-6).

Such argument, uncontested by the prosecution, clearly informed the jurors that unanimity was not a prerequisite for the consideration of mitigating factors. Cf. People v. Wade, 44 Cal. 3d 975, 244 Cal. Rptr. 905, 750 P.2d 794, 805 (1988) (argument of counsel prevented jury from being misled by ambiguity in instruction). Given the instructions cited above, such argument was correct and its conclusion was inescapable. Accordingly, no juror could have believed that unanimity was a prerequisite for the consideration of any mitigating circumstances. Id. Thus, there was no "Mills violation"

and no need for any additional instructions on a subject adequately addressed by the court's instructions. Mackey, supra.

III. GIVEN THE UNDISPUTED EVIDENCE OF SERIOUS PHYSICAL ABUSE AND TORTURE IN THIS CASE, THERE WAS NO UNCONSTITUTIONAL APPLICATION OF THE CONCEPTS "ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED," EVEN WITHOUT FURTHER LIMITING INSTRUCTIONS FROM THE COURT.

The defendant complains that this defendant's death sentence must be vacated because the "especially heinous, cruel, or depraved" statutory aggravator is unconstitutionally vague and overbroad in violation of the cruel and unusual and Due Process Clauses of the United States and Colorado Constitutions. This argument lacks merit for three reasons: first, the facts of this case precluded any unconstitutional application of the concepts "especially heinous, cruel, or depraved," second, defendant's admission that the alleged statutory aggravators were proven and the overwhelming evidence of cruelty, heinousness and depravity rendered any lack of limiting instructions harmless, and third, the jury's finding of five other statutory aggravators and weighing of aggravation and mitigation also rendered any lack of limiting instructions entirely harmless.

A. The facts of this case precluded an unconstitutional application of the concepts "especially heinous, cruel, or depraved" and allow an appellate construction of these terms which obviates any claim of unguided jury discretion.

Statutory aggravators based on concepts such as especially heinous, cruel, depraved, wanton or vile are not facially unconstitutional; rather, without further definitional limits, they may be unconstitutionally applied to impose a death sentence for ordinary murders which do not exhibit truly aggravating circumstances. Godfrey v. Georgia, 446 U.S. 420

(1980). However, where a murder manifests aggravated battery or serious physical abuse prior to and independent of the physical act of killing, a state appellate court may construe terms such as especially heinous, cruel, depraved, wanton or vile to include such acts and thus affirm the jury's sentencing decision. Godfrey, supra. In this manner, appellate review of the facts which underlie the aggravator insures that there was no unchanneled exercise of jury discretion. Davis v. Kemp, supra, at 1533-34 (affirming Georgia Court's construction of aggravator where victim was raped and killed as part of robbery, died from loss of blood, was beaten about face, repeatedly stabbed, slashed and cut, death prolonged). Accord Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) ("especially heinous, atrocious or cruel" where defendant shot victim in head after she begged for mercy, then slashed her throat with a knife until she was dead); Woratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987) ("especially heinous" where victim was stabbed, strangled and hit on head and was alive during assault); Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987) ("heinous" where victim bound and gagged prior to being stabbed and shot); Pinkney v. State, 538 So.2d 329 (Miss. 1988) ("especially heinous" where victim suffers physical or mental pain or lingering or torturous death); State v. Smith, 756 S.W.2d 493 (Mo. banc 1988) (torture or depravity where victim suffered 50 stab wounds); State v. Griffin, 756 S.W.2d 475 (Mo.banc 1988) ("depravity of mind" where victim had substantial time to anticipate death and to endure pain of stab wounds); State v. Beaty, 762 P.2d 519 (Ariz. 1988) ("especially cruel, heinous or depraved manner" are disjunctive terms, the presence of any one of three is an aggravator; cruelty involves the pain and suffering of victim, including mental distress); Hayes v. State, 738 P.2d 533 (Okla.Crim.App. 1987) ("especially heinous" where defendant abducted 9-year-old girl, raped and murdered her by cutting her throat); State v. Williams, 690 S.W.2d 517 (Tenn.

1985) (torture, meaning severe physical or mental pain, proves depravity).

The recent decision in Maynard v. Cartwright, 108 S.Ct. 1853 (1988), does not change this principle permitting an appellate court to "cure" a possible unchanneled exercise of jury discretion.[6] Indeed, Maynard v. Cartwright is controlled by Godfrey and is "clearly an application, rather than an expansion of, Godfrey." Mercer v. Armontrout, 864 F.2d 1429, 1435 (8th Cir. 1988).

The Maynard v. Cartwright court held that in the absence of a narrowing construction, the "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague. Maynard v. Cartwright, supra. The Maynard v. Cartwright court also found that a limiting construction of "torture or serious physical abuse" would be acceptable, although this was not the only permissible construction. Id. at 1859-60. Because Oklahoma courts had not applied such a limited construction to "cure" an unchanneled jury determination as to that specific aggravator, the Supreme Court remanded the case without prejudice for sentence reconsideration under state procedures. Id. at 1860.

Moreover, the circumstances of the murder in Maynard v. Cartwright do not indisputably support a conclusion that the killing was especially heinous or atrocious and thus any contrary conclusion by a state court would not cure the unconstitutional application of the "especially heinous" aggravator. Id. at 1859. Godfrey had reached a similar result. It concluded that although in previous cases the Georgia Supreme Court

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[6]State courts are the "ultimate expositors of state law" and the United States Supreme Court is "bound by their constructions." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). Vagueness claims of aggravators must be considered by state appellate courts and the Supreme Court will examine vagueness and overbreadth claims in the statutory criteria only to determine whether there is a substantial risk that the capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See Proffitt v. Florida, 428 U.S. 242, 254 n. 11 (citing Gregg v. Georgia, supra, 428 U.S. 153, 201 n. 51 (1976)).

had restricted its "'approval of the death penalty under this statutory aggravating circumstance to those cases that 'lie at the core,'" the Godfrey murders involved neither aggravated batteries or torture as did previous cases construed by the Georgia court. Id. at 1765-67 (quoting Harris v. State, 237 Ga. 718, 230 S.E.2d 1, 10 (1976)). Both state courts merely concluded that the language of the aggravator "adequately supported the jury's finding," Maynard v. Cartwright, supra, at 1859, or "was not objectionable," Godfrey at 1764. Neither made findings consistent with previous constructions that the evidence supported the aggravator--nor could they have because in both cases the victims died instantly as a result of shotgun blasts. Maynard v. Cartwright, supra, at 1855, Godfrey at 1760. Despite previous cases which required torture or "evidence of serious physical abuse of the victim before death," id. at 1766, the Godfrey facts suggested none and the jury repeatedly was told that the murders did not involve "torture." Id. at 1767. "The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court" in previous cases. Id. Similarly, in Maynard v. Cartwright, the state courts' reliance on certain other facts such as motive, lying in wait, attempting to steal belongings "did not cure the constitutional infirmity" of the "especially heinous" aggravator, id. at 1859.

In effect, then, the United States Supreme Court's conclusion in Maynard v. Cartwright and Godfrey that the aggravator was unconstitutionally applied was a two-pronged approach: first, that the jury's discretion was unguided, in terms of its application of the statutory aggravator, and second, that the construction by the reviewing state court was inadequate to cure any unguided determination. See Jeffers v. Ricketts, 832 F.2d 476, 482 (9th Cir. 1987).

Whether the "especially heinous, cruel or depraved" aggravator was properly applied in this case is a question that must be determined by this court, see Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2920, 49 L.Ed.2d 913 (1976); Maynard, supra; Godfrey, supra; State v. Griffin, supra (distinguishing Maynard because limiting construction sufficiently definite to provide principled means to distinguish cases in which death is imposed from those in which it is not); Clemons v. State, 535 So.2d 1354 (Miss. 1988) ("especially heinous, atrocious or cruel" not unconstitutionally vague in light of limiting construction, brutal and torturous facts surrounding murder). In so doing, this court may apply a construction which will provide a "principled way" to distinguish cases "in which the death penalty was imposed, from the many cases in which it was not." Maynard v. Cartwright at 1859 (quoting Godfrey at 433).

Such a construction of "especially heinous, cruel, or depraved" is particularly appropriate here because evidence of physical abuse precluded any possibility of an unconstitutional application of these terms. See Davis v. Kemp, supra. Lorraine Martelli's murder involved torture cuts, choking, facial beating, bleeding to death from multiple stab wounds, kidnapping and rape, along with the victim's awareness for about one hour that she would be murdered. Clearly the trial court's reading of Godfrey[5], cited in defendant's Motion to Strike Alleged Aggravating Factors, see Opening Brief, Appendix 1, would have persuaded it that the facts satisfied Godfrey and should permit a constitutionally appropriate construction by this court. Thus, after hearing the evidence, the trial court committed no error by not providing an instruction further limiting the terms "especially heinous, cruel, or depraved," particularly because no such instruction

[5]Maynard v. Cartwright, issued in 1988, was not before this trial court.

was requested or supplied by defendant.[6] The facts in this case simply did not allow for an unconstitutional application of the "especially heinous, cruel or depraved" aggravator by reasonable jurors.[7] Such applications are necessarily based on evidence that excludes torture and serious physical abuse, see Godfrey, supra. Here, however, evidence of torture and serious physical abuse, if believed by the jury, provided the only basis for a finding that this crime was especially heinous or cruel.

B. Given the undisputed evidence of serious physical abuse and torture, and the defendant's admission of the aggravator, any lack of a limiting instruction was harmless.

Harmless error, i.e., "[a]ny error, defect, irregularity, or variance which does not affect substantial rights, shall be disregarded." Crim.P. 52. Where it can be concluded, beyond a reasonable doubt, that an error of constitutional significance did not effect the outcome or undermine the fairness of a proceeding that error may be deemed harmless. Chapman v. California, 386 U.S. 18, 24-25 (1967), People v. Rodgers, 756 P.2d 980, 984 (Colo. 1988). If there is a reasonable possibility that the defendant could have been prejudiced, the error cannot be harmless beyond a reasonable doubt. Leonardo v. People, 728 P.2d 1252, 1257 (Colo. 1986). See also, Barclay v. Florida, 463 U.S. 939

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[6]The defendant's challenge to this aggravator at the trial level apparently was limited to the submission of the Motion to Strike, supra. There is no indication that an instruction which further defined or guided the jury ever was offered, and the defendant's proposed verdict form which listed the various statutory aggravators merely stated that "The Defendant committed the offense in an especially heinous cruel or depraved manner." (v. 3, p. 744-45).

[7]This court must presume that jurors will act reasonably, e.g., Mills v. Maryland, supra, California v. Brown, supra. And, while reasonable jurors were free to disbelieve all the medical evidence of torture and serious physical abuse they could not do so and still find that the killing was "especially heinous, cruel, or depraved." Indeed, such an unconstitutional application of this aggravator would have required the jury to reject all the medical evidence of torture cuts, strangle holds, facial beatings and multiple non-lethal stab wounds and simply believe that the victim died of a few lethal wounds to the heart and then base its finding of "especially heinous, cruel, or depraved" on these few lethal wounds. Such a scenario on the part of reasonable jurors is inconceivable.

(1983) (harmless-error analysis applied to improperly considered aggravating circumstance because sentencer's consideration did not "so infect" the balancing process; no constitutional defect in death sentence based on both statutory and nonstatutory aggravating circumstances); Zant v. Stephens, 462 U.S. 862 (1983) (invalidation of aggravator did not require vacation of death sentence because evidence adduced in support of invalid aggravator properly admissible at sentencing); Johnson v. Mississippi, 108 S.Ct. 1981 (1988) (jury's consideration of prior invalid felony conviction as aggravator prejudicial where prosecutor repeatedly urged jury to give conviction weight in connection with balancing; error extended beyond mere invalidation of aggravator supported by evidence otherwise admissible, instead, jury allowed to consider "materially inaccurate" evidence).

The Supreme Court has issued "repeated admonitions" to apply harmless-error analysis to constitutional errors in capital cases, Coleman v. Saffle, supra, at 1388 (citing Satterwhite v. Texas, 108 S.Ct. 1792, 1798 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); Chapman v. California, supra. Constitutional errors requiring per se reversal "'either aborted the basic trial process . . . or denied it altogether.'" Coleman v. Saffle, id. (quoting Rose v. Clark, 478 U.S. 570, 578 n.6 (1986)). "'If a defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.'" Coleman v. Saffle, id. at 1388 (citing Rose at 579). The error must go "to the very integrity of the legal system" before harmless error analysis is precluded. Coleman v. Saffle, id. (quoting Gray v. Mississippi, 107 S.Ct. 2045, 2056 (1987)). Although in two cases the Supreme Court has reversed death sentences because it could not conclude that the constitutional error had "no effect" on the sentencing decisions, see Skipper v. South Carolina, 476 U.S. 1,

8 (1986) (relevant mitigating evidence refused), and Caldwell v. Mississippi, supra (minimization of jury's responsibility), that has not been the standard applied in cases involving invalid aggravators, see e.g., Barclay, Zant v. Stephens. Coleman at 1389 n.11. Harmless error analysis is applicable to the submission of an invalid aggravating circumstance in a statutory system which likewise employs a balancing, or weighing, process. See Coleman v. Saffle, supra.

Here, the facts were undisputed that the victim was killed in an "especially heinous, cruel, or depraved manner." The "heinous" nature and the proof of the crime were admitted by defense counsel. In his penalty phase closing argument, defense counsel stated, "Make no mistake about my argument. The death of Lorraine Martelli was heinous and a terrible death . . . " (v. 34, p. 129). He agreed that "Lorraine Martelli suffered greatly." (v. 34, p. 163). And he specifically told the jury that all the statutory aggravators had been proved, see SUPPLEMENTAL STATEMENT OF THE FACTS, supra. No objections were made to statements made by the two prosecutors in closing and rebuttal closing arguments that the death was cruel, heinous, "agonizingly slow," "terrible and gruesome," a "tortured death," that she was "brutally tortured to death." (v. 34, pp. 108-12, 170, 179-80). And the evidence irrefutably demonstrated a case of torture. As stated, Lorraine Martelli was brutally raped, kept alive and assaulted for hours, told she eventually would be killed, she begged for her life, suffered a facial beating and non-lethal "torture" cuts, was stabbed multiple times, and finally died from loss of blood. The People presented no argument that the aggravator was proved by anything other than this torture and, although not instructed specifically, "torture"--along with statements of the "gruesome," "agonizingly slow" death she suffered--consistently was argued. (v. 34, pp. 104, 109-10, 112, 170, 179-80, 182). The only argument offered in

mitigation of this evidence was that a co-defendant might have wielded the knife and did not receive death a death sentence (v. 34, pp. 127-67).

As stated earlier, the evidence here is unlike that in Maynard v. Cartwright and Godfrey, in which there was no evidence of torture. The evidence here also is unlike that in Coleman v. Saffle, supra (victims died of shotgun wounds), and Stouffer v. State, 742 P.2d 562 (Okla.Crim. 1987) (victim unconscious after first shot in head), where the harmless error arguments concerned "mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible." Coleman v. Saffle, supra; Stouffer, supra, at 564. Here, no reasonable jury could have concluded other than that Lorraine Martelli was tortured to death, and no reasonable jurors could have disagreed about the meaning of the evidence, making any failure to provide a limiting instruction to that effect harmless. See Wade, supra, at 807-08.

C. Finally, the use in this case of the "especially heinous, cruel, or depraved" aggravator was harmless because there was overwhelming evidence of five other aggravators and even if the "heinous" aggravator were discarded it is clear beyond a reasonable doubt that the jury would have reached the same result.

In Colorado, the finding of one statutory aggravator proved beyond a reasonable doubt sufficiently guides and channels the jury's discretion and therefore constitutionally distinguishes the murder from all other murders in which death may not be imposed. At the weighing stage, the jury weighs all the proven aggravators and all mitigation and then determines the appropriate penalty. Here, any consideration by this jury of the "heinous" aggravator at the weighing stage was negligible in part because all the evidence supporting it was properly admissible because circumstances of the crime always are appropriate. See Borrego, supra; sec. 16-11-103(1)(b). Mere labeling of the otherwise

admissible evidence could not have "so infected the balancing process" created by sec. 16-11-103 that it is constitutionally impermissible for this court to let the sentence stand. See Barclay, supra. See also, Borrego, supra (sec. 16-11-103(1)(b) grants trial judge wide discretion to determine relevant, admissible evidence at capital sentencing). The mere numerical presence of an invalid statutory aggravator could not have affected the jury's weighing process because the jury was instructed not to count aggravators, see Part VII, infra. See also, State v. Tassin, 536 So.2d 402 (La. 1988) (subsequent invalidation of aggravator does not invalidate death sentence when evidence to support heinous aggravator constituted res gestae of offense).

Moreover, this aggravator for the "especially heinous" nature of the killing did not present the primary penological justification for a death sentence in this case. Rather, it was defendant's killing of a victim/witness to his lesser felonies of November 14, 1986, which constituted the overriding focus of the People's case and provided the main justification for the death penalty. The People repeatedly argued that these lesser felonies already subjected defendant to life imprisonment, that he killed Miss Martelli precisely for the purpose of avoiding such a life sentence and that, therefore, any sentence less than death had no penal significance and demeaned the life of this victim.

In any event, if at least one proven statutory aggravator remains valid, consideration of an invalid aggravator either in determining whether death is appropriate or in the weighing process may be harmless, Coleman v. Saffle, supra. Such was the case here, because the remaining proven aggravators sufficiently narrowed the jury's discretion and the jury conducted its individualized consideration by considering all mitigation against the proven aggravators. Although Zant v. Stephens, supra, did not involve a weighing process, a death penalty scheme in which the jury balances aggravating

and mitigating circumstances is "not all that different, in reality, from other schemes, if the jury knows in advance the consequences of its finding of aggravating circumstances." Coleman v. Saffle, supra, at 1388 (citing Franklin v. Lynaugh, supra, at 2331 n.12 (1988)) (refusing to vacate death sentence although unconstitutional aggravator submitted where overwhelming evidence of guilt, remaining four aggravating circumstances strongly supported by evidence, and no mitigation)). See also Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988) (death sentence not vacated when one of three aggravators held invalid and jury instructed to weigh statutory aggravating circumstances against mitigation); Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988) (invalid aggravator not entitle defendant to new sentencing where evidence supported another); James v. Butler, 827 F.2d 1006 (5th Cir. 1987) (invalid aggravator did not impair death sentence where evidence supported another); Pinkney, supra, (death sentence intact though "heinous" vague where valid aggravator remained).

Here, all the evidence concerning the "especially heinous" aggravator concerned the circumstances of the crime, was properly admitted and could not have affected either the quality or quantity of the aggravation. And, because the evidence was overwhelming as to the five other aggravators, particularly the crucial circumstance of killing a witness, "the "especially heinous" aggravator at the weighing stage was harmless beyond a reasonable doubt.

IV. THE JURY WAS PROPERLY INSTRUCTED THAT ITS VERDICT WOULD CONCLUSIVELY DETERMINE WHETHER DEFENDANT WAS GIVEN LIFE IMPRISONMENT OR PUT TO DEATH. COMMENTS BY THE COURT AND COUNSEL GENERALLY REINFORCED THIS INSTRUCTION AND THERE CAN BE NO DOUBT WHATSOEVER THAT THE JURORS FULLY REALIZED THE CONSEQUENCES OF THEIR VERDICT.

Defendant complains that comments by the trial court and prosecutors as well as the instructions informed the jury that a death verdict was not conclusive or binding. This argument is entirely without merit. The instructions and statements of counsel, particularly when read together, left no doubt that the jury bore the requisite responsibility for the question of whether defendant would be put to death. Cf. Wade, supra.

A jury in a capital sentencing proceeding must be "adequately informed" of the effect of its verdict on the ultimate question of life imprisonment or death. People v. Drake, supra, at 1254 (Colo. 1988). This is sufficiently accomplished where the jury is instructed that certain findings regarding aggravation will "necessarily require the imposition of a death sentence." Durre, supra, at 174. The jury must be made aware of its role as the sentencing authority so that it will consciously decide whether, in light of mitigating and aggravating factors, "a sentence of death is the appropriate sentence." Drake, supra, at 1257 (emphasis added). Here, the penalty phase instructions and verdict forms by themselves accomplished these objectives with language that left no doubt as to whether or not the jury believed that death was the "appropriate" penalty. (See e.g., instruction 15, v. 3, p. 772 which uses term "appropriate." See verdict form v. 3, p. 753 in which jury found death to be "appropriate").

It now would be inconsistent for this court to declare that the language in these instructions or verdict forms was not sufficiently emphatic, when it followed this court's own language in Drake, supra. This is particularly true since the statements of counsel also reinforced the notion that the jury's verdict would determine whether defendant would receive life imprisonment or be put to death e.g., v. 34, pp. 122-124, 127-128. Cf. Wade, supra. In any event, there was no dilution of the jury's sense of responsibility

for the ultimate question of whether defendant received life or death. See Caldwell v. Mississippi, supra; Parks v. Brown, supra. Rather, the instructions and statements of counsel insured that the jury was "adequately informed" as to the effect of its verdict on this ultimate question. See Drake, supra, at 1254. Thus, the verdicts unquestionably reflect the jurors' certainty that death was the "appropriate" penalty. Id., at 1257.

Instruction 2 stated as follows:

> Members of the jury, the evidence in the sentencing hearing has been completed and I will now instruct you on the law. After these instructions and after closing arguments by counsel, it will then be your duty to decide whether Frank D. Rodriguez should be put to death or whether he should be sentenced to life imprisonment.

(v. 3, p. 758). Defendant argues that the use of the word "should" connoted an advisory rather than a mandatory verdict and that his tendered instruction No. 1 was less ambiguous. However, the court's instruction was very graphic and emphatic in its use of the words "put to death," while defendant's tendered instruction referred to a "sentence of death" which, in the minds of any reasonable juror, could be commuted or overturned on appeal (see v. 3, p. 685). Moreover, when used with obligatory words such as "duty," the word "should" connotes a mandatory process rather than a discretionary one. Town of Edgewater v. Liebhardt, 32 Colo. 307, 76 P.2d 366 (1904). See also People v. District Court, supra (jury's function is that of determining whether defendant "should" receive life or death). This mandatory nature of the jury's decision is reinforced when instruction 2 is read together with instruction 12 which states:

> This presumption of life imprisonment remains with Mr. Rodriguez throughout these proceedings, unless the prosecution proves to your satisfaction beyond a reasonable doubt that Mr. Rodriguez should be put to death instead of being sentenced to life in prison.

Clearly "should" is the proper word to use in these instructions. Id. A more emphatic term such as "will" or "must" would have added little to the jury's consciousness of the import of their verdict, see Drake, supra, at 1257, while improperly suggesting that a death verdict somehow was required or expected. Use of terms such as "must" or "will" in this context would have suggested only that an execution was a foregone conclusion and that the jury's role was simply that of a "rubber stamp." Cf. District Court, supra (overly emphatic instruction requiring subordination of juror's personal values disapproved). Moreover, the jury was informed that it could sentence defendant to life imprisonment regardless of the weight of aggravating evidence (instruction 13, v. 3. p. 769) because mitigating factors included "any" other circumstance "for not imposing a death sentence" (instruction 20, v. 3. p. 778). In this manner each juror emphatically was reminded that if aggravation was established and no jury member perceived some mitigating factor as a reason for not imposing death, a death sentence would be imposed.

Finally, any conceivable remaining doubt as to the effect of their verdict would have been remedied by instruction 21 which stated:

> In the third step of your deliberations you must weigh the aggravating factor or factors found to exist against any and all mitigating factors. This is not a mere counting process in which aggravating factors are weighed against mitigating factors. Rather, it is a process in which you must apply your reasoned judgment in deciding whether the situation calls for life imprisonment or requires imposition of the death penalty in light of the totality of the circumstances present.

(v. 3, p. 779) (emphasis added).

Defendant cites various phrases from other instructions which, when taken literally and apart from all the other directives, conceivably could permit a conclusion that the verdict simply would be advisory. (Opening Brief, pp. 90-93). In particular, defendant complains of instruction 23 which described how executions are performed pursuant to

jury verdicts and the ante-voir dire instruction which described how the court will impose life or death "depending on the determination of the jury." Id. However, the proper inquiry is what a reasonable juror would have understood the entire charge or set of instructions to mean. See Mills v. Maryland, supra; California v. Brown, supra. Given this standard, there is no question that the instructions when read together were adequate, see Manier, supra, and that the jury made a conscious decision as to the appropriateness of a death sentence. See Drake, supra, at 1257. Neither instruction 23 which described the ministerial function of the court in ordering a death sentence pursuant to a jury verdict, nor the ante-voir dire instruction which also described this process, could have undermined the reliability of this decision. Indeed, defense counsel conceded that instruction 23 was a correct statement of the law (v. 34, p. 85, ll. 17-18), and, the language in the ante-voir dire instruction which defendant finds objectionable (Opening Brief, p. 93) was prescribed by this court in District Court, supra. This language adequately apprised the jury as to how its determination would result in the court imposing a sentence of life or death. Id., 546 P.2d at 1271. In this manner, the ante-voir dire instruction removed any possible doubt as to whether such a determination could be ignored by a trial judge.

Furthermore, statements of counsel reinforced, rather than diminished, the jury's sense of responsibility over the ultimate question of whether defendant would be put to death.

Mr. Silverman stated:

> Jail is not enough. There has to be more. There is more. There is the death penalty.
>
> There are two options you have in terms of sentencing, life imprisonment or death . . . . Those are still your options; only two of them; life imprisonment or the death penalty.

It's a difficult decision. I don't want to minimize it for you. . . .

(v. 34, p. 113, ll. 5-22).

The defendant was undeterred by the death penalty because he thought no jury would ever give it to him. But the People submit that you are the jury.

(v. 34, p. 122, l. 25).

We think we have all people (jurors) who can follow the law and impose the death penalty when it is appropriate as it is here....

(v. 34, p. 124, ll. 8-10).

putting someone to death is certainly not a pleasant proposition . . .

(v. 34, p. 125, ll. 9-10).

We have read the bood [sic] of the Life of Frank D. Rodriguez. The People submit its a book of murder and cold-blooded violence against completely innocent citizens of Denver . . . . Let's make sure this is the final chapter, ladies and gentlemen. Let's close the book on Frank Rodriguez. Return a verdict of death.

(v. 34, p. 126, ll. 1-8).

This final statement using the analogy of closing the book of the life of Frank Rodriguez graphically reminded the jury that their role was that of deciding whether defendant would live or die.

Similarly defense counsel made the following general remarks in his summation:

Frank Rodriguez will be in prison . . . .

The only question is who will decide when he dies? Will it be you or will it be God?

(v. 34, p. 127, ll. 16-17).

It is possible for us to accomplish the purposes of protection of society and the punishment of Frank Rodriguez without

taking his life, without killing. It is not necessary to take his life to punish him and to protect us.

(v. 34, p. 128, ll. 11-18).

Defense counsel then discussed the differences between the guilt and penalty phases of trial stating:

Now the question before you is totally different. Must this man die in the gas chamber in Canon City . . . .

(v. 34, p. 129, ll. 21-24).

Now our society insists a person not be killed unless twelve members of this community are unanimously very, very certain of the heavy presumption we have always had in our society in favor of life has been overcome. It is your task to determine whether this case is one in which we can say with unshakable confidence that this man must die.

(v. 34, p. 130, ll. 8-13).

We can't tell you, but is it too much to ask that you should be convinced to your moral satisfaction before a person should die? . . . . Obviously, if you reach that moral decision inside and you agree that they have proven beyond a reasonable doubt that he should die then that should be your verdict . . . .

(v. 34, pp. 138-139).

Defense counsel later criticized Mr. Silverman's summation and even equated a death verdict to an act of killing:

It's easier to kill somebody if you don't think they're human and that's the point of their argument.

(v. 34, pp. 154-155).

In a similar context, defense counsel then discussed defendant's letter to Margie Marquez and stated:

They were supposed to make him look as vicious as possible so they (the prosecutors) could come into court and blow him up and present them to you and inflame the passions in you to kill him . . . .

> You can't kill him for the terrible things he says in these letters.
>
> The prosecutor will say well, we're not telling you to kill him for that; we're telling you to kill him for what he does.

(v. 34, pp. 155-156).

Defense counsel then commented on Judy Archuleta stating:

> There is no question she was raped, but did she have to come into court and twist the evidence and change the facts to try to convince you to kill him?

(v. 34, p. 156, ll. 8-141).

> [The prosecutor] is urging you to kill Frank Rodriguez because of the Archuleta case, why did he let them plea bargain to aggravated robbery in 1979?
>
> If the case wasn't strong enough then to go to trial and get a conviction, how can it be enough to kill Frank Rodriguez today?

(v. 34, p. 158, ll. 3-12).

> The prosecutor wants you to kill Frank Rodriguez on the testimony of Patricia Thomas and Judy Archuleta . . .

(v. 34, p. 159, ll. 19-21).

In a different context, defense counsel stated:

> There is no way you can avoid the responsibility of voting to take the life of another human being and place it on your fellow jurors. It has to be your decision. Frank Rodriguez is entitled to twelve separate verdicts.

(v. 34, p. 160, ll. 8-12).

Finally, in closing his argument, defense counsel stated that it was not necessary to kill Frank Rodriguez and that each juror held the power to stop such unnecessary killings (v. 34, pp. 166-168).

In rebuttal, Mr. Little asked the jury to "enforce that last fall-back position of a free society" (v. 34, pp. 183-184). In context, this was a request for a death verdict which could only reinforce the jury's sense of responsibility for the ultimate question of life or death (v. 34, pp. 182-185).

In summation, these statements of counsel and the above-cited instructions eliminate any question regarding the reliability of the jury's verdict, see Durre, supra, or its sense of responsibility for the ultimate question of life or death. See Drake, supra. Indeed, simply taking the instructions as a whole removes any doubt regarding whether the jury believed that death was the "appropriate" penalty, thus satisfying the standard set forth by this court. Id. This unanimously held belief "that death is the appropriate punishment" clearly is set forth in the verdict form (v. 3, p. 753) in a manner paraphrasing this court's language in Drake, supra, at 1257. Thus, taking this verdict form, together with the instructions and final arguments, it would be "fantasy" outside "the realm of common sense" for an appellate court to presume that the jurors did not correctly perceive their function in the sentencing of a defendant convicted of first degree murder. District Court, supra, 190 Colo. at 345, 546 P.2d at 1290.

V. THE INSTRUCTIONS AND VERDICT FORM COMPLIED WITH THE STATUTORY REQUIREMENTS AND CONSTITUTIONALLY CHANNELED THE JURY'S DISCRETION. ANY INCONSISTENCIES IN THE INSTRUCTIONS OR VERDICT FORM OPERATED TO THE DEFENDANT'S ADVANTAGE, INCLUDING THE INSTRUCTION THAT AT THE FOURTH AND FINAL STAGE OF DELIBERATION, THE DECISION WAS SOLELY IN THE JURY'S DISCRETION.

The defendant complains that penalty phase instructions 15 and 21, along with the verdict form, violated sec. 16-11-103, 8A C.R.S. (1986), as well as constitutional guarantees against cruel and unusual punishment and of a fair and impartial jury. These

violations follow, he argues, because the instructions and the verdict form permitted the jury to consider arbitrary, unfair, irrelevant, and inflammatory matters rather than making its decision on statutory criteria (Opening Brief at 101-08).

Section 16-11-103(2), C.R.S. (1986), provides, in pertinent part:

> (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a decision based upon the following considerations:
>
> (I) Whether at least one statutory aggravating factor has been proved beyond a reasonable doubt as enumerated in subsection (6) of this section;
>
> (II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and
>
> (III) Based on the considerations in subparagraphs (1) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.
>
> . . . .
>
> (b)(II) The jury shall not render a verdict of death unless it finds and specifies in writing that:
>
> (A) At least one aggravating factor has been proved; and
>
> (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

Instruction 15 provided elaborate and step-by-step guidance for the jury's deliberative process in making its sentencing decision. Among other guiding principles, it specifically set forth the statutory criteria to be considered. It provided, in pertinent part:

> The first step in your deliberations is to decide whether the prosecution has proven the existence of at least one specified aggravating factor beyond a reasonable doubt. If one or more jurors finds that none of the specified aggravating factors has been proven beyond a reasonable doubt, then the result is a sentence of life imprisonment. If and only if all jurors agree that one or more specified aggravating factors have been proven beyond a reasonable doubt, then you should proceed to the second step in your deliberations.
>
> The second step in your deliberations is to decide whether any mitigating factors have been shown to exist. Mitigating factors include but are not limited to the mitigating factors listed in Instruction No. 20 which follows later.
>
> The third step in your deliberations involves a weighing of the specified aggravating factor or factors against any and all mitigating factors. You may consider only those aggravating factors [sic] or factors found to exist beyond a reasonable doubt. You may assign any weight you wish to each aggravating or mitigating factor. It is the weight assigned to each factor, and not the number of factors found to exist that is to be considered. If one or more jurors finds sufficient mitigating factor or factors exist that outweigh a specified aggravating factor or factors, then the result is a sentence of life imprisonment. If and only if the jury finds that one or more specified aggravating factors outweigh the mitigating factors, the jury then should proceed to the fourth step.
>
> The fourth step in your deliberations is to decide whether the defendant should be sentenced to death or life imprisonment. This decision is solely in your discretion. If one or more jurors finds that life imprisonment is the appropriate penalty, then the result is a sentence of life imprisonment. Unless you unanimously agree that the prosecution has proven that the death penalty is the appropriate punishment beyond a reasonable doubt, you must return a verdict of life in prison.

(v. 3. p. 771-72) (emphasis added).

Instruction No. 21[8] essentially reinforced those statutory considerations, instructing the jury about weighing mitigating factors against aggravating factor or factors found to exist and informing the jury that a determination that death was appropriate was possible only if the jury first unanimously found that there were no mitigating factors or that any mitigating factors were insufficient to outweigh the proven aggravators. (v. 3, p. 779-80). Finally, the verdict form provided:

[8]Defendant mistakenly cites instruction 20, the list of mitigating factors, as the objectionable one instead of 21.

> We, the jury, find that there is insufficient mitigating factors to outweigh the aggravating factor or factors which have been proved by the prosecution beyond a reasonable doubt.
>
> Having found that six aggravating factor(s) were proven beyond a reasonable doubt and based upon all the evidence presented, we further find that death is the appropriate punishment in this case beyond a reasonable doubt.

(v. 3, p. 753).

Instructions 15 and 21, and the instructions as a whole, and the verdict form were, in fact, inconsistent with the statute only insofar as the instructions and verdict form required the prosecution to meet additional non-statutory and non-constitutional burdens of proof. These included overcoming presumptions of life and of innocence with regard to the commission of any aggravating factors (instructions 3, 12, 16, v. 3, pp. 759, 768, 773-74) (see, e.g., Blair v. Armontrout, 643 F.Supp. 785, 792 (W.D.Mo. 1986); proving beyond a reasonable doubt that any factors in mitigation did not outweigh aggravation (instructions 3, 15, 21, v. 3, pp. 759, 771-72, 779-80) (see, e.g., Gray v. Lucas, 685 F.2d 139 (5th Cir. 1982); State v. Bass, 460 A.2d 214 (N.J. Super. 1983); Tichnell v. State, 415 A.2d 830 (Md. 1980)); proving beyond a reasonable doubt that aggravation outweighed the mitigation (instructions 15, v. 3, pp. 771-72) (see. e.g., People v. Babbitt, 45 Cal.3d 660, 248 Cal.Rptr. 69, 755 P.2d 253 (1988); Tichnell, supra); and proving beyond a reasonable doubt that death was the appropriate penalty (verdict form and instructions 3, 12, 15, 28, v. 3, pp. 753, 759, 768, 771-72, 787), (see e.g., People v. Drake, supra, (Rovira, J., concurring and dissenting); Andrews v. Shulsen, 802 F.2d 1256, 1260 (10th Cir. 1986), cert. denied, 107 S.Ct. 1964 (1987); People v. Jennings, 46 Cal.3d 963, 251 Cal.Rptr. 278, 760 P.2d 475 (1988), cert. denied, 109 S.Ct. 1559 (1989); Turner v.

Commonwealth, 364 S.E.2d 483 (Va. 1988)).[9] Moreover, these additional burdens of proof and variations from the statutory weighing formula are consistent with instructions proffered by the defendant and refused by the trial court. See Defendant's Proposed Instructions For The Penalty Phase, instructions 4(a) and (b), 5, 10, 17 (a), (b), (d) and (e), 18, 21, 24 (a), (b) and (c), 25, 26 (v. 3, pp. 688-90, 695, 699-03, 707, 709-15).

The instructions as a whole and the verdict form certainly did not permit the jury to consider irrelevant and inflammatory matters against the defendant. They limited the jury's consideration to "the evidence," i.e., to proof of the statutory aggravators (instructions 8, 9, 10, 16, 19, v. 3, pp. 764-66, 773-74, 777), to showing whether mitigating circumstances existed (instructions 11, 20, v. 3, pp. 767, 778), to consideration of other relevant evidence which went to the process of weighing aggravation and mitigation and making a constitutionally required "individualized consideration," see, e.g., Borrego, supra (plain language of sec. 16-11-103(1)(b)[10] grants trial judge wide discretion to determine what evidence is relevant and admissible), Lockett v. Ohio, 438 U.S. 586 (1978), and to determining whether the mitigation was sufficient to outweigh the aggravation (instructions 15, 21, v. 3, pp. 771-72, 779-80). Such proof properly included, among other things, the offenses allegedly committed against Judy Archuleta and George Stapleton. See SUPPLEMENTAL STATEMENT OF THE FACTS, pp. 3-7, supra.

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[9] These extra-statutory prosecutorial burdens of proof are the subject of pending People's consolidated appeals before this court in People v. Tenneson, 88 SA 114 (filed May 6, 1988) and People v. Vialpando, 88 SA 258 (filed July 27, 1988), orally argued May 4, 1989.

[10] sec. 16-11-103(1)(b) provides in pertinent part: All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, and any matters relating to any of the aggravating or mirigating factors enumerated in subsecitons (5) and (6) of this section may be presented.

Admittedly, instruction 15 referred to the jury's "sole discretion" to decide whether the defendant should be sentenced to death or life imprisonment. (v. 3. p. 772). However, that "sole discretion" specifically was to be exercised only at the fourth step of the four-stage process elaborately outlined in instruction 15. Defendant's claim that the use of this phrase "turned loose" the jury with no constraints (Opening Brief at 106) misperceives the statutory sentencing role of the jury; takes that portion of instruction 15 out of context, and views the entirety of instruction 15 in "artificial isolation." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

In Colorado, the ultimate life or death determination is for the jury, not the judge, to make. Drake, supra; Durre, supra. This determination lies within the jury's "discretion." Drake, supra; Durre, supra. See also, McCleskey v. Kemp, 107 S.Ct. 1756, 1778-79, n.37 (1987) (if capital defendants are to be treated as "uniquely individual human beings," then discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed is essential). Indeed, the instructions and verdict forms must clearly advise the jury of its absolute responsibility in determining the sentence to be imposed. E.g., Drake, supra; Durre, supra. The use of the word "solely" here only served to emphasize to the jurors that at this point, the decision was theirs and theirs alone to make. See Caldwell v. Mississippi, supra, at 340 n.7 (1985) ("solely responsible for [the defendant's] sentence" . . . when it makes the often highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves").

The constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing scheme that permits the jury to exercise discretion in determining whether the death penalty should be imposed after it

has found that the defendant is a member of the class made eligible for that penalty by statute, California v. Ramos, 463 U.S. 992, 1008 n. 22 (1983).

> "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008, 103 S.Ct. 3446, 3456, 77 L.Ed.2d 1171 (1983).
>
> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Barclay v. Florida, supra, at 950-51 (1983) (emphasis added).

Here, the jury was told that its decision as to whether the defendant should be sentenced to death or life imprisonment was "solely" in its discretion, but only at the fourth step, after finding that the defendant fell within the legislatively defined category of persons who are death-eligible.

These statutorily-based instructions were not violative of the defendant's constitutional guarantees because the jury's discretion was constitutionally channeled. A jury's discretion is guided in a "constitutionally adequate way" when its attention is directed to the nature or circumstances of the crime and the character and the background of the defendant. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976). This

occurs by requiring the jury to "genuinely narrow" the class of persons eligible for the death penalty and "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder,"[11] see, e.g., Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988), and to make an "individualized determination" as to the particular defendant, including considering any and all circumstances relating to the crime or the defendant which would mitigate against the imposition of a death penalty, see, e.g., Skipper v. South Carolina, supra; Lockett v. Ohio, supra.

Here, before it could exercise "sole" discretion as to whether a sentence of life or death was appropriate, the jury first was required: in step 1 of instruction 15, to narrow the class of death-eligible offenders by finding that at least one statutory aggravator had been proved beyond a reasonable doubt, see Gregg v. Georgia, supra; in step 2, to consider all mitigating factors, Skipper, supra, Lockett, supra; and in step 3, to weigh factors of mitigating against specified aggravating factors. (Athough not constitutionally required, the jury's discretion further was guided by requiring it to weigh the aggravation and mitigation and determine whether there was insufficient mitigation to outweigh proven aggravation.) It was only after the jury first unanimously concluded that at least one statutory aggravator had been proved beyond a reasonable doubt, considered all relevant mitigation, and determined that insufficient mitigation existed to outweigh proven aggravation that it could consider whether, in its discretion, death was appropriate. Having reached this point, there is no constitutional objection to the jurors deciding, according to their own personal standards, which of the two penalties was appropriate.

[11]The narrowing function may be performed by jury findings at either the sentencing or guilt phase, the latter system held constitutional in Jurek v. Texas, 428 U.S. 262 (1976). Jurek narrowed the "categories" of murders for which a death sentence could be imposed, the resulting procedure serving "much the same purpose as the lists of statutory aggravating circumstances adopted by other states. Zant v. Stephens, supra, at 875 n. 13.

People v. Milner, 45 Cal.3d 227, 246 Cal.Rptr. 713, 753 P.2d 669, 686 (1988). See also, e.g., Barclay, McCleskey, Ramos, Zant v. Stephens, supra.

Moreover, the reference in instruction 15 to the jury's "sole" discretion would, if anything, have conveyed to the jurors only the option of choosing life, not death, in disregard of its findings as to the proven aggravators and that there was insufficient mitigation to outweigh the aggravation. After all, the jury was instructed that it could consider "mercy" for the defendant (instructions 20 and 26, v. 3, pp. 778, 785); that the concept of mitigating factors included, in addition to the defendant's role in the crime and the character, background, and history of the defendant, see, e.g., sec. 16-11-103(1)(b), "any other factor which constitutes a reason for not imposing a death sentence" (instruction 20, v. 3, p. 778); and that it could sentence the defendant to life in prison even if it found that no mitigating factor existed or that insufficient mitigation existed to outweigh the proven aggravation (instruction 13, v. 3, p. 769). These instructions as a whole served to notify the jury that it was free in its sole discretion to exercise leniency for the defendant even though the constitutional and statutory justification for imposing the death penalty had been proven. See, e.g., Milner, supra. See, also, Barclay, McCleskey, Ramos, Zant v. Stephens, supra.[12]

Finally, instructing the jury that the ultimate penalty decision was in its "sole discretion" essentially corresponds with instructions tendered by the defendant but refused

[12]Unbridled discretion in favor of a life sentence is not constitutionally required. E.g., California v. Brown, 479 U.S. 538 (1987); State v. Beaty, supra; Commonwealth v. Peterkin, 513 A.2d 373, 387-88 (Pa. 1986), cert. denied, 107 S.Ct. 962 (1987); State v. Wagner, 305 Or. 115, 752 P.2d 1136 (1988). It is not permitted under the current death penalty statute. See sec. 16-11-103(2)(a)(III), C.R.S. (1988 Supp.) (In the event that the jury finds that at least one statutory aggravating factor has been proved beyond a reeasonable doubt, and that there are insufficient stastutory mitigating factors or other mitigating circumstances to outweigh any statutory aggravating factor or factors that were proved and any other aggravating circumstances that were proved, the jury shall return a sentence of death) (emphasis added).

by the court. See Defendant's Proposed Instructions For The Penalty Phase, numbers 2 ("Each of you must express your own personal conscience and each of you must make a moral assessment on the ultimate question of life in prison or death"), 3 ("[whether the death penalty should be imposed] is a decision that is left to you as a jury"), 5 ("Each of you must make your own, individual moral assessment whether Mr. Rodriguez shall be sentenced to life in prison or to death"), 24 (a), (b), and (c) ("The ultimate decision must be your own") v. 3, pp. 686-87, 690, 709-11).

VI. THE TRIAL COURT PROPERLY REFUSED TO GIVE THE DEFENDANT'S PRO-DEFENDANT, ANTI-VICTIM SYMPATHY INSTRUCTION BECAUSE THE LAW DOES NOT REQUIRE THAT SUCH BE GIVEN, PARTICULARLY WHERE THE JURY IS TOLD TO USE REASON IN MAKING ITS ULTIMATE PENALTY DECISION. IN ANY EVENT, THE JURY WAS INSTRUCTED THAT IT COULD HAVE "MERCY," A SYNONYM FOR SYMPATHY, FOR THE DEFENDANT AND ALSO WAS INSTRUCTED DURING THE GUILT PHASE THAT IT SHOULD NOT BE INFLUENCED BY SYMPATHY OR PREJUDICE AND THAT IT SHOULD "COMPLETELY DISREGARD" MEDIA COVERAGE.

The defendant tendered Instruction 19(a) which stated:

> [T]he first part of this trial, I instructed you that you were not to be swayed by sympathy. However, in this part of the trial the law permits you to be influenced by mercy, sentiment and sympathy for Mr. Rodriguez as mitigating circumstances. You must not be influenced by prejudice, bias or public opinion against Mr. Rodriguez. You must not be influenced by sympathy for the victim against Mr. Rodriguez."

(v. 3, p. 704).

The defendant had no right to have the jury consider sympathy for him but not for the victim. Rice, supra, 757 P.2d at 908. Accordingly, defendant's instruction was properly declined, particularly because the jury was instructed to base the ultimate life or death decision on its reasoned judgment (instruction no. 21, v. 3, p. 779). Id.

Moreover, there is a difference between sympathy based on the evidence and sympathy which arises as a result of extraneous emotional factors totally divorced from the consideration of the evidence. The latter is improper. Instead, the jury should make an individualized assessment of the appropriateness of the death penalty, e.g., a "moral inquiry into the culpability of the defendant." See California v. Brown, supra, at 542; Coleman v. Saffle, supra; Parks v. Brown, supra, at 1553; People v. Williams, 45 Cal.3d 1268, 248 Cal.Rptr. 834, 756 P.2d 221 (1988), cert. denied, 109 S.Ct. 883 (1989). However, consideration of sympathy grounded upon relevant evidence is not improper. A jury's determination in the penalty phase of trial need not and should not be devoid of all sympathy for the victim, where such sympathy is based on the evidence and represents an assessment of the circumstances of the crime and of the forseeable consequences of a defendant's conduct. See State v. Rice, supra at 904-08 (prosecutor may ask jury to stand in shoes of victim); Middleton, supra (prosecutor could comment that a sentence other than death was a mockery to memory of the victim); Copeland, supra (prosecutor could ask jury to look at the picture of the 11-year-old victim if it got weak knees during its deliberations). Indeed, such assessments of a defendant's conduct from the victim's viewpoint is "germane to the task of sentencing." Rice, supra; People v. Haskett, 30 Cal.3d 841, 863-64, 180 Cal.Rptr. 640, 640 P.2d 776 (1982). Here, Lorraine Martelli's death, and the manner of her death, are connected directly with the nature and circumstances of the crime for which the defendant was to be judged. As mentioned earlier at Part III, supra, the "especially heinous" aggravator requires a showing of the commission of serious physical abuse to the victim apart from the murder itself and it is unrealistic and humanly impossible for the jurors to totally divorce themselves from any consideration as to the plight or feelings of the victim while she was

being tortured to death. See Coleman v. Brown, supra (emotion inevitable in capital case). Requiring that the sentencer be permitted to focus on the "circumstances of the particular offense" as a constitutionally indispensable part of the process of imposing the death penalty both satisfies the Eighth Amendment requirement of reliability that "death is the appropriate punishment in a specific case" and also that the penalty is imposed "fairly, and with reasonable consistency, or not at all." See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Lockett v. Ohio, supra, at 608. Therefore, it is inappropriate to instruct capital jurors to totally divorce their deliberations from any consideration of the torturous effects on the victim of the defendant and his coparticipants. The forseeable effect of those acts upon the victim is a legitimate part of the moral assessment of the nature of the crime as the jurors reflect on whether a defendant deserves the death penalty. See Rice, supra.

Defendant erroneously relies upon a number of alleged incidents which occurred during the penalty phase[13] in support of his claim that a more specific anti-victim

[13] Defendant claims there was a "mini-trial" on Lorraine Martelli's character which "risked distracting the jury from its constitutionally required task"; that because the defendant and three co-defendants were Hispanic and the victim was a "middle-aged, white, unmarried woman who cared for her mother," there was a "danger of the sympathy for her and bias against" the defendants which would "overwhelm" the decision-making process; that the victim's family "caused" several in-court outbursts; and, that the prosecutor sought to inflame jurors' emotions against the defendant by engendering sympathy for the victim and her family.

The jury heard that Lorraine Martelli was an unmarried woman of age 54 who, pursuant to a daily routine, returned home to care for an elderly woman, was walking to her car at the time and place where defendant and his brother, Chris Rodriguez, were looking for an automobile to steal. These facts concerned the "circumstances of the particular offense" rather than a "mini-trial" on Lorraine Martelli's character. Indeed, if there was a mini-trial, it was staged by defense counsel, who, himself, uttered extremely sympathetic remarks about the victim at both the guilt and sentencing phases of trial (v. 24, pp. 151-54, v. 34, p. 165), and who provoked the first so-called "outburst" cited in defendant's brief while cross-examining a witness about whether the victim, if she could come back, was the type of person who would not wish anything bad upon the people who had done this to her (v. 24, p. 154). When this questioning provoked an audible reaction from the spectators, defendant objected, claiming that the reaction came from the victim's family. The court refused to admonish the family in view of defendant's line

sympathy instruction was necessary. If error occurred as a result of any of the alleged incidents, however, it was remedial by way of objection and/or instruction rather than by informing the jury that at the close of the case that it it "must not be influenced by sympathy for the victim against Mr. Rodriguez."

Moreover, the jury effectively was instructed as the defendant requested. First, the jury was instructed that, in addition to any enumerated mitigator, it could consider "any other factor which constitutes a reason for not imposing a death sentence" (instruction 20, v.3, p. 778); that mitigating circumstances included those "which do not constitute a justification or excuse for the offense in question, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability" (instruction 26, v. 3, p. 785 (emphasis added); and that it still could sentence the defendant to life in prison even if it decided that no mitigating factors existed or that there was insufficient mitigation to outweigh proven aggravation (instruction 13, v. 3, p. 769). These instructions adequately encompassed the pro-defendant sympathy portion of the rejected instruction particularly because in the death sentencing context, "mercy" virtually is synonymous with sympathy for a defendant. See People v. Sanchez, 503 N.E.2d 277 (Ill. 1986), cert. denied, 107 S.Ct. 3240 (1987) (trial court properly refused

of questioning and comments, pointing out that the court was uncertain whether "it came from the family or not. I heard it, too, from generally the audience." (v. 24 p. 154). The second "outburst" references defense counsel's complaint to the court in a bench conference that he "heard some snickering again" (v. 34, p. 97). The trial court, at the time, instructed all spectators to remain silent (Id.).

Defendant's claim of racial bias was based on the differing races of the victim and the defendant. Defendant was given the opportunity during jury selection to ascertain whether or not there would be any racial bias against him and to challenge for cause any jurors who exhibited potential bias.

Finally, defendant's claim that prosecutors inflamed the passions of the jury against him and engendered sympathy for the victim are dealt with at length elsewhere in this brief, see Argument I, supra.

to tender proposed jury instruction indicating that jury could extend mercy to defendant where trial court allowed jury to consider "any other mitigating factor" in making its decision and where defendant was allowed to present sympathetic testimony); see also People v. Boyde, 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25 (1988) (reasonable juror would not have believed that he was not allowed to consider sympathy for defendant at penalty phase where prosecutor implored jury to make reasoned decision); State v. Mak, 718 P.2d 407 (1986), cert. denied, 107 S.Ct. 599 (1986) ("mercy" and "sympathy" both are defined in terms of "compassion"; trial court's "mercy" instruction in penalty phase gave defendant full leeway to argue sympathy, thus, failure to give specific instruction on sympathy not improper); Clemons v. State, supra (instruction that jury need not find any mitigating circumstances in order to return sentence of life gave defendant no basis to complain of court's denial of submitted mercy instruction).

Finally, this court should consider defendant's assumption in argument VIII, infra, that instructions given in the guilt phase necessarily will be remembered and utilized by jurors in the penalty phase. While the People do not accept this assumption, see argument VIII, infra, its acceptance by this court would necessarily dispose of this particular argument. The jury was instructed during the guilt phase of trial that "[n]either sympathy nor prejudice should influence your decision" (instruction 1, v. 2, p. 560), and that it should "disregard" any news coverage and base its decision solely on the evidence (instruction 11, v. 2., p. 571). Clearly, if this directive "carried over" into the penalty phase, there was no need for defendant's tendered anti-sympathy instruction.

VII. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY THAT IT COULD NOT EMPLOY NUMERICAL CONSIDERATIONS IN ITS WEIGHING OF THE MITIGATING OR AGGRAVATING FACTORS PRESENTED AT THE PENALTY PHASE. AND, THE JURY EXPLICITLY

WAS INSTRUCTED TO WEIGH AGGRAVATING AND MITIGATING FACTORS.

The defendant claims that Instructions No. 15 and 21[14] "forbade" the jury both from considering the number of mitigating factors presented and the cumulative impact of evidence offered in mitigation. He also complains that by instructing the jurors that "[t]his is not a mere counting process in which aggravating factors are weighed against mitigating factors," the jurors thereby were told "not to weigh" the aggravating and mitigating factors, resulting in "confusion" and "bewilderment." (Opening Brief at 116-21.) The defendant cites no caselaw to support his arguments.

Instruction 15 provided, in pertinent part:

> The third step in your deliberations involves a weighing of the specified aggravating factor or factors against any and all mitigating factors. You may consider only those aggravating factors or factors found to exist beyond a reasonable doubt. You may assign any weight you wish to each aggravating or mitigating factor. It is the weight assigned to each factor, and not the number of factors found to exist that is to be considered.

(v. 3, p. 772) (emphasis added). Instruction 21 provided, in relevant part:

> In the third step of your deliberations you must weigh the aggravating factor or factors found to exist against any and all mitigating factors. This is not a mere counting process in which aggravating factors are weighed against mitigating factors. Rather, it is a process in which you must apply your reasoned judgment in deciding whether the situation calls for life imprisonment or requires the imposition of the death penalty, in light of the totality of the circumstances present.
>
> The number of factors found is not determinative. The jury may emphasize one factor more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating factors in making this determination.

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[14]The defendant mistakenly refers to Instruction No. 20 as dealing with the weighing process instead of Instruction No. 21. Instruction 20 provides a list of mitigating factors (v. 3. pp. 778-80; Opening Brief at 118).

(v. 3, p. 779) (emphasis added).

These instructions sufficiently channeled the jury's discretion in making the death determination. There is no federal constitutional requirement that a state "adopt specific standards instruction the jury in its consideration of aggravating or mitigating circumstances." Zant v. Stephens, supra, at 890. See also, Jones v. Butler, 864 F.2d 348 (5th Cir. 1988)); Andrews v. Shulsen, supra, cert. denied. 108 S.Ct. 1091 (1988); Sonnier v. Maggio, 720 F.2d 401 (5th Cir. 1983), cert. denied. 104 S.Ct. 1331 (1984); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. denied. 104 S.Ct. 201 (1983).

There is an inherent danger in instructing a jury without some elaboration that it shall impose a sentence of death if it concludes that the aggravating circumstances outweigh the mitigating, that being that it "will perform the weighing process in a mechanical fashion by comparing the number of factors in aggravation with the number in mitigation, or by the arbitrary assignment of weights to the factors." People v. Edelbacher, 47 Cal.3d 983, 254 Cal.Rptr. 586, 766 P.2d 1, 33 (1989). Although here we are concerned with instructions and not a statute, if a statute required jurors to render a death verdict on the basis of some arithmetical formula, or if it forced them to impose death on any basis other than their own moral judgment that such a verdict was appropriate, it would not pass constitutional muster. People v. Brown, 40 Cal.3d 512, 230 Cal.Rptr. 834, 726 P.2d 516, 531 (Cal. 1985), rev'd on other grounds, California v. Brown, supra.

The various factors to be considered by a sentencer do not have numerical weights assigned to them, Proffitt v. Florida, supra, at 258, because the nature of the weighing process "is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process." People v. Gates, 43 Cal.3d 1168, 240 Cal.Rptr.

666, 743 P.2d 301, 324 (1987), cert. denied, 108 S.Ct. 2005 (1988). "Weighing is a metaphor which by nature is incapable of precise description. People v. Howard, 243 Cal.Rptr. 842, 44 Cal.3d 375, 749 P.2d 279 (1988), cert. denied, 109 S.Ct. 188 (1988). "Weighing" connotes a mental balancing process. People v. Brown, supra, 726 P.2d at 532. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider. Id. Therefore, no constitutional infirmity results from a failure to make the number of aggravating and mitigating factors a matter of numerical calculation. See People v. Sanchez, supra. If so, it seldom would be the case that an imaginative defense counsel could not provide more specific items of minimal mitigating value and thereby outnumber the number of aggravators. Instead, because the sentencing authority is given specific evidence to weigh, based upon the particularized circumstances of the case, any "discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." See Gregg v. Georgia, supra, 428 U.S. at 198.

Here, the jury was instructed simply that the death determination should not be made on the basis of a simple counting process, a proviso that reflected defendant's tendered (but refused) instruction 25, which provided in pertinent part:

> In deciding whether the aggravating factor or factors outweigh the mitigating circumstance or circumstances, you should not merely count up the number of aggravating factors and compare that to the number of mitigating circumstances. Also, you should not merely assign values to the aggravating and mitigating factors and subtract one value from another. Your decision on life in prison or death should not be mechanical or mathematical.

(v. 3 p. 712). The jury was not precluded, in any fashion, either from weighing the aggravation and mitigation or from considering either the quality of any one piece of mitigating evidence or the overall, cumulative impact of all the mitigating evidence.

Instruction 15 specifically referred the jury to "a weighing of the specified aggravating factor or factors against any and all mitigating factors." (v. 3, p. 771-72). See also, instruction 21 ("In the third step of your deliberations you must weigh the aggravating factor or factors . . . against any and all mitigating factors) (v. 3, p. 779-80). In fact, neither the prosecutors nor defense counsel saw instructions 15 and 21 as limiting the jury's consideration in this regard and all three attorneys, in various ways, told the jury in closing arguments that it must weigh the aggravating and mitigating factors and conduct a "weighing process." (v. 34, pp. 101, 139, 171).

VIII. THERE WAS NO CARRYOVER OF THE COMPLICITY INSTRUCTION USED AT THE GUILT PHASE TO SENTENCING AND THE TRIAL COURT WAS CORRECT IN REFUSING DEFENDANT'S INSTRUCTION THAT THE JURY MUST IGNORE COMPLICITY THEORIES AT THE PENALTY STAGE. TISON V. ARIZONA AND ENMUND V. FLORIDA DO NOT PRECLUDE, BUT PERMIT, IMPOSITION OF THE DEATH PENALTY ON A COMPLICITOR WHO HAD THE REQUISITE INTENT AND DEGREE OF INVOLVEMENT IN COMMITTING THE CRIME AS LONG AS THE SENTENCE IS BASED ON THE INDIVIDUAL'S OWN CULPABILITY.

Defendant claims that because the jury was given a complicity instruction at the guilt phase it could have employed complicity principles at the sentencing phase in considering whether certain statutory aggravators were proven, thereby precluding an indvidualized sentencing determination (Opening Brief at 121-31). Defendant had therefore tendered his instruction no. 35 which excluded all complicity principles from the penalty phase.[15] The trial court properly declined to give this instruction and

[15] Instruction 35 provided:
In the first part of this trial, you were instructed on the principle of complicity, by which a person may be criminally liable for the actions of another. You are instructed that this principle does not apply in the penalty phase of this trial (v. 3, p. 726).

defendant's argument lacks merit for two reasons. First, it assumes that the jury went outside the penalty phase instructions and applied principles which were given several days earlier, even before the intervening habitual criminal phase. Second, defendant's instruction wrongly excluded all complicity principles from the sentencing phase and even if the jury applied complicity principles from the guilt phase this did not unfairly prejudice him. In this regard, defendant's reliance on Tison v. Arizona, 107 S.Ct. 1676 (1987), and Enmund v. Florida, 458 U.S. 782 (1983), is misplaced. Those cases explicitly recognize that a complicitor is eligible for the death penalty if his conduct involves "major participation in the felony committed, combined with reckless indifference to human life." Tison, 107 S.Ct. at 1688.

Defendant's assumption that complicity principles automatically carried over to the penalty phase, beyond the interspersed habitual criminal phase, is legally and factually unsupported. Indeed, during each phase of trial, the jury received separate specific instructions detailing the substantive law to be appled at that phase. These instructions limited the law to be applied by the jury to the specific phase, and thereby precluded application of substantive principles given in previous phases. See e.g., instruction 1 at the penalty phase ("I will read you the law which you must apply in order to reach your sentencing decision." "[Y]ou are to evaluate . . .facts in light of the requirements set forth in these instructions"). (v. 3, p. 756).

Thus, the jury's findings of aggravating circumstances reflects its determination that defendant personally was responsible for these aggravators and that they were not the work of an accomplice. See Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983), cert. denied, 105 S.Ct. 224 (1984) (instructions did not permit jury to find death penalty could be based solely upon accomplice's killing of victim where sole purpose of instruction was

to furnish basis upon which jury could determine defendant's guilt of substantive offense); Nichols v. State, 754 S.W.2d 185 (Tex.Crim. 1988), cert. denied, 109 S.Ct. 819 (1989), overruled, in part, on other grounds, 764 S.W.2d 242 (Tex.Crim.1989) (no egregious harm by lack of charge that complicity principles may not be applied to penalty issues; evidence concerning defendant's conduct substantially supported jury's findings). This conclusion that defendant personally committed these aggravators further is supported by the instructions' descriptions of these factors as well as by findings of the trial court. With regard to five of the six proven aggravators, the instructions required that "the defendant" be found guilty of the specified conduct and in so doing did not allow for culpability through the conduct of another. (v. 3., pp. 773-74). Similar requirements were set forth in the statutory aggravators verdict forms. (v. 3, pp. 746-52). Four of the aggravators required specific intent--killing of a witness, killing of a hostage, felony murder, and agreement to kill. (v. 3, pp. 773-74). This mental culpability element insured an individualized determination in accordance with Tison. Moreover, the trial court found that the evidence of the defendant's guilt was "overwhelming" and that his culpability and involvement demonstrated a "great difference" in comparison with coparticipants, specifically, David Martinez. (v. 36, pp. 9-10).

In any event, no complicity instruction was given and the individual culpability of the defendant as a basis for the jury's penalty decision was emphasized throughout closing arguments by both prosecutors and by defense counsel. (v. 34, pp. 97-185). Thus the jury had no basis for imposing the death penalty because of another individual's conduct. See Skillern v. Estelle, supra, Nichols, supra. Therefore, this case is very unlike Borrego, supra, which held that "a defendant's constitutional rights are violated if the jury in a capital offense sentencing hearing is given a complicity instruction." Id., slip op. at

This holding in Borrego can be harmonized with both Tison and Enmund in its requirement that the defendant "be considered as an individual before receiving a sentence of death." Borrego, slip op. at 7. This "individualized" sentencing determination does not mean that defendant may not receive the death penalty for a murder in which another participant physically killed the victim, Tison, supra, and physically acted so as to cause the aggravating circumstances. Rather, it means that he cannot be sentenced to death for such a killing unless he acted with the requisite mental culpability to commit a murder involving aggravated circumstances. Id. Borrego holds that a traditional complicity instruction which allowed a jury to attribute one particpant's conduct to another may not serve as a means for imposing death. It does not hold that a defendant's participation, much less his leadership, in a killing physically performed by someone else may not be punished by death where the jury considers that defendant's individual role and finds the requisite mental culpability either at the guilt or penalty phase. Accordingly, defendant was not entitled to an all-encompassing instruction which flatly stated complicity does not apply to the penalty phase and the court properly declined his instruction 35. Indeed, a complicitor is eligible for the death penalty if his conduct involves "major participation in the felony committed, combined with reckless indifference to human life," Tison, supra, at 1688, or if he actually killed, attempted to kill, or intended to kill, Enmund, supra, at 801.

While the Tison court left open the issue as to whether a court constitutionally could attribute to a defendant as an aggravating factor the manner in which other individuals carried out killings, see Tison, 107 S.Ct. at 1682 n.2, the logic of the Tison decision compels that conclusion as long as the ultimate decision is based on the

defendant's personal culpability. Moreover, as long as there is an "individualized" sentencing determination, a complicitor may be put to death for a murder physically committed by someone else. Id. In this regard, the mental culpability requirement for such determination may rest upon a guilty verdict which necessitated a finding of intent, see Cabana v. Bullock, 106 S.Ct. 689, 695-96 (1983), Enmund, supra. Similarly, it can be based upon a finding of "major participation" and "reckless indifference," see Tison, supra, or upon appropriate factual findings of personal culpability made by a state trial judge or appellate court, see Cabana, supra, at 696-97.

Here, defendant was eligible to be considered for the death penalty by virtue of either his conviction of premeditated murder or his conviction of felony murder combined with proof at least one statutory aggravator showing intent. See Enmund, supra, Tison, supra. This is not strictly a felony murder case as were Enmund and Tison. The jury's guilt verdict as to murder after deliberation alone is a sufficient basis for making the defendant death-eligible under Enmund. Similarly, if the jury had found the defendant guilty only of felony murder but also found certain statutory aggravators which included a mens rea of intentionally, he would be death-eligible. In fact, that is precisely what defense counsel told the trial court in successfully objecting to a special felony murder verdict form proposed by the People at the guilt phase that would requiree a jury finding of intent as to the killing of Lorraine Martelli:

> If the People go into a specific penalty phase and the Court allows those aggravating factors, and the jury comes back beyond a reasonable doubt for each aggravating factor, the People are protected on the record that there has been a jury finding the defendant intended to kill; it's included within the aggravating factors.
>
> So, as far as protecting their rights on appeal, as far as there being no question in the record for an appellate court to determine as a matter fact that the defendant intended to kill, if the evidence is he did not actually do the killing that

> can be certainly satisfied by one[,] fact[s] of this case, and two, by the special verdict forms the jury will get as part of the penalty phase in this case; the specific findings there.

(v. 29, pp. 173-76). See State v. McCall, 770 P.2d 1165, 1172 (Ariz. 1989) (conviction for premeditated murder and conspiracy to commit premeditated murder sufficient to qualify defendant under Enmund/Tison analysis, notwithstanding lack of actual finding that defendant personally killed or attempted to kill victims; moreover, because defendant had "reckless disregard for human life" and "major participation" in crimes leading to deaths he constitutionally could be sentenced under Tison felony murder standard); Laws v. Armontrout, 863 F.2d 1377 (8th Cir. 1988), cert. denied, 109 S.Ct. 1944 (1989) (noting that death penalty not disproportionate where, although defendant neither intends to kill victim nor inflicts fatal wounds, shows major participation in felony which results in murder and has mental state of reckless indifference to value of human life); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), cert. denied, 109 S.Ct. 872 (1989) (in finding defendant guilty of premeditated murder, jury concluded that defendant intended victim's death, satisfying Enmund).

Thus, this case does not present the same danger of a defendant being put to death solely upon the conduct of another as was contemplated by this court in Borrego, supra. Defendant became death-eligible on the basis of the first degree murder conviction in which the jury found that he intentionally killed the victim. It also found at least one statutory aggravator in which complicity principles could not have played any role, that "the Defendant was under sentence of imprisonment for a class 3 felony as defined by Colorado law" when the murder occurred. (v. 3, p. 750). In this regard, this case necessarily would have reached that stage in the penalty phase where the jury weighed aggravation and mitigation without any application of complicity principles.

And, once it reached that stage, the jury was instructed to consider as mitigating factors the roles of the various participants including the allegation that David Martinez played a greater part than defendant (instruction 20, v. 3, p. 778). Thus, even if complicity principles from the guilt phase were used by the jury as a means of establishing the other aggravators there was no unfair prejudice because these other aggravators did not preclude an individualized sentencing determination. See Lockett, supra.

Moreover, such use of complicity principles as a means of allowing jurors to find that aggravators were proven was constitutionally permissible, as long as there was a sufficient basis for the jury to conclude that defendant had the requisite intent that the crime be committed in an aggravated manner. Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989) (assuming that Eighth Amendment forbids imposing death penalty against mere acomplice as punishment for cruel nature of killing without proof beyond a reasonable doubt that acomplice intended killing to be cruel, state supreme court's findings about defendant's intent adequate to uphold application of aggravating circumstance against defendant, though he was not present and murder and torture were inflicted by hired triggerman). In this regard, defendant's claim that cuts on David Martinez' hands established that he did the actual stabbing would make no difference because there is abundant evidence that defendant had the requisite intent that the killing take place and that it occur in the aggravated fashion reflected by the penalty phase verdict. For example, the defendant's intent to kill a witness to avoid prosecution was established by evidence based on evidence that never involved David Martinez, specifically, defendant's letters to Margie Marquez and the Archuleta and Stapleton episodes.

Complicity instructions of the type rejected in Borrego, supra, may not have satisfied this mental culpability requirement. Thus, the Borrego court properly ruled that mere complicity in an underlying murder may not be a basis for imposing the death penalty, without more, because to do so would impermissibly treat two defendants in the same manner. Here, the evidence sufficiently demonstrates that defendant intended the killing be committed in an aggravated manner and thus he may be sentenced to death even if he did not personally inflict the fatal wounds. Hopkinson, supra; McCall, supra, People v. Jimerson, 127 Ill. 2d 12, 535 N.E.2d 889 (1989); Townsend v. State, 533 N.E.2d 1215 (Ind. 1989); State v. West, 767 S.W.2d 387 (Tenn. 1989); Laws v. Armontrout, supra; Ruffin v. Dugger, supra.

Here, the trial court's findings regarding defendant's individual culpability also rendered insignificant any possibility that the jury may have imputed Martinez' alleged stabbing of the victim to defendant.

Either a either a trial judge or an appellate court is "fully competent" to make the decision as to whether a death sentence is so disproportionate as to violate the Eighth Amendment. Cabana, id. at 697. That is so because Enmund established no new elements of the crime of murder. Rather, it held only that the principles of proportionality embodied in the Eighth Amendment bar imposition on convicted capital murderers who did not themselves kill, attempt to kill, or intend to kill, Cabana, id. at 696, or who were not "major participants" and did not exhibit "extreme indifference" to the value of human life, Tison, supra. See also, Ross v. Kemp, 756 F.2d 1483, 1487 (11th Cir. 1985) (defendant not entitled to new sentencing hearing solely because jury returned a general guilty verdict after being instructed on felony murder and conspiracy; rather, just as Supreme Court in Enmund reviewed record as construed by Florida

Supreme Court, this court concludes from record that defendant's culpability satisfies Eighth Amendment). The trial court made specific findings as to the defendant's culpability and participation in the crime and, implicitly, his "extreme indifference" to Lorraine Martelli's life in denying his Motion to Impose a Sentence of Life Imprisonment, which claimed, in part:

> [T]he only credible evidence was that David Martinez, not Frank Rodriguez, killed Lorraine Martelli. The prosecution's willingness to allow Martinez to plead guilty to a Class Two felony, and to be set free in less than 10 years is irreconcilable with putting Mr. Rodriguez to death.

(v. 36, p. 9). The court findings concluded that the "evidence of the defendant's guilt was overwhelming." Concerning the defendant's culpability and his participation in comparison with that of David Martinez, the court found: "The evidence clearly showed a great difference between the culpability and involvement in the crime between Martinez and the defendant." (v. 36, pp. 9-10). Finally, the trial court implicitly emphasized the defendant's "extreme indifference" to and "major participance," see Tison, supra, in the progressive escalation of the crime from a

> motor vehicle theft conspiracy to the execution of a brutal murder. There were different phases of the crime; conspiracy to commit aggravated motor vehicle theft, which progressed to kidnapping, to aggravated robbery, to rape, to murder. At each point, the defendant could have stopped the execution of the next phase but declined to do so. Rather, he committed a series of deliberate acts.

(v. 36, pp. 15-16). See also, Laws v. Armontrout, supra; Gilliard v. Scroggy, 847 F.2d 1141, 1147 (5th Cir. 1988), cert. denied, 109 S.Ct. 818 (1989) (Enmund allows death penalty where defendant either kills, attempts to kill, intends to kill or contemplates lethal force will be used in felony; Tison added reckless indifference to human life); People v. Harris, 43 Cal.3d 1047, 255 Cal.Rptr. 352, 767 P.2d 619 (1989) (failure to

instruct on intent harmless, overwhelming evidence supported prosecution theory that defendant shot victim; death penalty not excessive for person convicted of felony murder under statute restricting imposition to defendants who actually killed, attempted to kill, intended to kill); People v. Walker, 47 Cal.3d 605, 253 Cal.Rptr. 863, 765 P.2d 70 (1988) (although deficient accomplice instructions did not advise jury that conviction as aider and abettor required not only that defendant have knowledge of the perpetrator's criminal purpose but also that he shared that purpose or intended to commit, encourage, or facilitate commission of crime, error harmless beyond reasonable doubt).

In this case, assuming arguendo this jury could have employed a complicity theory as to any of the statutory aggravators, this jury nevertheless made its constitutionally required "individualized" consideration" as to this defendant in examining his individual role and culpability in the crime through the mitigating evidence presented, see Lockett v. Ohio, supra, and thus his sentence of death was directly related to his "personal culpability." Tison, Enmund, Borrego, supra. This individualized consideration included the opportunity to compare his level of involvement with that of the other participants in the crime:

> You may consider as a mitigating factor any doubt you may have about Mr. Rodriguez' role or actions in this case. You may also consider the mitigating factor that Mr. Rodriguez' co-defendants have received sentences less than the death penalty."[16]

(v. 3, p. 778).

---

[16]Even here, defendant receives an undue break: he was not entitled to have the jury consider any residual doubts about his role in the crime, Franklin v. Lynaugh, supra, or to consider leniency given to accomplices, e.g., Brogdon v. Butler, 822 F.2d 338 (5th Cir. 1987), cert. denied, 108 S.Ct. 13 (1987); State v. Schneider, 736 S.W.2d 394 (Mo. 1987), cert. denied, 108 S.Ct. 786 (1988).

In sum, there was no carryover of complicity principles employed at the guilt phase but, assuming arguendo, there were, imposition of the death penalty was proper because this defendant's conduct satisfies the Enmund/Tison requirements, i.e., the defendant either actually killed, attempted to kill, or intended that Lorraine Martelli be killed, e.g., Enmund, or was a major participant in the felony committed and exhibited reckless indifference to Lorraine Martelli's life, e.g. Tison. Moreover, the evidence showed that he intended that the murder be committed in an aggravated fashion, even if he, himself, did not personally do the stabbing. The evidence persuades otherwise, however, as both the jury and trial court concluded. Under the circumstances, no reasonable juror could have found anything other than that the defendant, at the very least, had the type of involvement and culpability contemplated by Tison and Enmund, supra. In fact, in his closing argument, defense counsel stated to the jury that the defendant "is as guilty as David Martinez and anybody else in that car for the killing, because he was there and he participated. (v. 34, p. 141).

IX. THE TRIAL COURT'S HANDLING OF DEFENDANT'S REPEATED OBJECTIONS TO THE PROSECUTOR'S CLOSING ARGUMENTS CONSTITUTED NEITHER AN ABUSE OF DISCRETION NOR A DENIAL OF ANY CONSTITUTIONAL RIGHT.

Defendant alleges that the trial imposed an overly harsh rebuke of a defense objection during the prosecution's closing arguments. This complaint is without merit.

First, the record does not support defendant's version of how the trial court allegedly rebuked him, particularly with regard to the use of the offensive clauses "sit down" and "shut up." Rather, the record shows the following:

> Mr. Silverman: It's a very rare combination of a crime and a defendant that satisfies so many of the statutory criteria.

> Mr. Eisner: Objection Judge, to any comparison to this to other cases.
>
> The Court: Overruled. Let Mr. Silverman finish his argument.
>
> Mr. Eisner: Can the court please tell the jury I have a right to object?
>
> The Court: Mr. Eisner.
>
> Mr. Eisner: Thank you, Judge.
>
> The Court: Let Mr. Silverman finish his argument.
>
> Mr. Eisner: Just for clarification.
>
> The Court: Mr. Eisner, please have a seat.
>
> Mr. Silverman: This sort of conduct is rarely seen in Colorado . . . .

(v. 34, p. 102, ll. 4-18).

Other than his stated preference for a significantly more caustic version of this passage, defendant presents no conclusive reason as to why this court should not rely on the reported version of these proceedings. In a separate pleading, the People have objected to defendant's efforts to substitute his version for the official record. Attached to this pleading are affidavits which support the official version of the record. Clearly, the reported version is relatively inoffensive and does not constitute grounds for reversing a jury's verdict. See e.g., Drake, supra; McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972); Bentancourt v. State, 657 S.W. 2d 451 (Tex App. 1983); State v. Henderson, 547 S.W. 2d 141 (Mo. App. 1976).

Moreover, the argument to which defendant objected was not improper. Defendant wrongly alleges that the trial court previously ruled that this particular argument was unacceptable. In fact, the trial court had noted that it would be improper

for a prosecutor to state that he "seeks a death penalty in very few cases and (has) chosen this one as suitable" (v. 34, p. 96, ll. 13-14). Such a statement is very different from the simple assertion that it is rare or unusual to satisfy so many statutory criteria. The former statement definitely conveys the personal opinion that the case is suitable for the death penalty while the latter does not. Similarly, the prosecutor's remarks did not direct the jury's attention to anything it could not consider and the trial court properly overruled defendant's objection. See People v. Constant, 645 P.2d 843 (Colo. 1982). See also Argument I, instance 12, supra.

The trial court's subsequent remark of "Let Mr. Silverman finish his argument" was certainly not an "order" not to object and in fact trial counsel did not regard it as such. Trial counsel subsequently objected to Mr. Silverman's argument four additional times (v. 34, pp. 113-114; p. 115, l. 18, p. 116, l. 13; p. 124, l. 5). Given these repeated objections, the court's words "Let Mr. Silverman finish his argument," certainly did not prejudice defendant even if these words were to be construed as an "order" not to object.

However, far from being an "order," the words, "Let Mr. Silverman finish his argument," were simply a caution to avoid unnecessary or obstreperous objections; as such, it did not constitute an abuse of the trial court's discretion to control final argument, e.g., People v. Pesis, 189 Colo. 52, 536 P.2d 824 (1978), Motley, supra. Mr. Silverman's remarks about the rare combination of a crime and defendant that satisfies so many of the statutory criteria came relatively early in his argument, on the fifth full page of transcript. Defense counsel's objection to this remark already constituted his third objection to Mr. Silverman's closing and each of these prior objections were made in an unnecessarily argumentative manner. Defense counsel's first objection contained the unnecessary misstatement that the jurors "have not heard anything in the community,

they are here to decide the law" (v. 34, p. 99, ll. 6-8). Defense counsel's second objection, while proper, also evidenced efforts by defense counsel to become argumentative in front of the jury (v. 34, pp. 100-101). Accordingly, the simple caution "Let Mr. Silverman finish his argument" was not an inappropriate judicial response to what undoubtedly was perceived as overly argumentative conduct by one counsel during opposing counsel's closing. See Bashford v. People, 110 Colo. 479, 135 P.2d 516 (1943) (judge's rebuke of counsel's persistent, inappropriate conduct not reversible error). See also Sacher v. United States, 343 U.S. 1, 9 (1952) (counsel may not resist judge in pressing claim, his right is only to respectfully preserve point for appeal).

Defense counsel then demanded that the trial court instruct the jury that "I have a right to object" (v. 34, p. 102, ll. 10-16). However, the subsequent colloquy evidenced a measured judicial response to this demand, that is, the judge's directive to "Please have a seat." See Sacher, supra; Bashford, supra. Again, the judge's remarks did not evidence an abuse of her discretion to control final argument or govern the course of trial. See Pesis, supra. In no event did they evidence the "substantial bent of mind" against a defendant which would warrant reversal. Drake, supra.

It is not possible for the trial transcript to convey volume or tone of voice used by defense counsel during his remarks or objections and accordingly this court should defer to the trial court's discretion in cautioning him. See Pesis, supra; Bashford, supra. However, even if the caution "Let Mr. Silverman finish his argument" or the measured response of "please have a seat" are viewed as an abuse of discretion, they are not grounds for reversal, as they indicated no opinion as to the appropriateness of the death penalty for this defendant. Cf., Bashford, supra; see also McCune v. People, 179 Colo. 262, 499 P.2d 1184 (1972) (remarks of trial judge in ruling on objections cannot be

reversible error where they did not reflect upon defendant). Moreover, given the evidence against defendant and his subsequent admission that the alleged aggravators were proven, these remarks simply did not infect the trial with such unfairness as to constitute a denial of due process. See Darden v. Wainwright, supra.

Finally these remarks did not necessitate the giving of defendant's tendered instruction No. 3 (opening brief, pp. 137-138). The jury was adequately instructed not to draw conclusions from objections or the court's rulings on them in penalty phase instruction No. 1 (v. 3, pp. 756-757). See e.g., People v. Lee, 199 Colo. 301, 607 P.2d 998 (1980) (Court may properly refuse instruction where other instructions adequately address subject).

CONCLUSION

Defendant does not dispute his guilt of the murder and other wanton crimes against Lorraine Martelli. Defendant admitted the seven alleged aggravators (v. 34, p. 139, ll. 8-11). The jury, in a considered verdict, then found that six of these aggravators were proven. Defendant's primary claim in mitigation was simply that a complicitor wielded the knife. Even this claim stands substantially refuted by testimony of Patricia Thomas and medical analysis of the victim's wounds as well as by the trial court's findings regarding the relative culpability of defendant and his accomplices. Accordingly, the jury's verdict should not be set aside by this court and defendant should be put to death in accordance with the laws of this state.

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CERTIFICATE OF MAILING

I do hereby certify that on the 31st day of May, 1989, I deposited a true and complete copy of the foregoing Answer Brief, properly addressed, in the U.S. mail to:

Michael Heher, Esq.
Deputy State Public Defender
1362 Lincoln St.
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_____

APPENDIX A: SELECTED CORRESPONDENCE

OF FRANK D. RODRIGUEZ

(Selected from Defendant's

Exhibit 20; relevant portions

underlined)

[redacted] just received your sweet letter
and as always you made my day.
[redacted] your letters sure have been
[redacted] real sweet, just like you..
Now all I need to do is taste all that
[redacted] of you. can I? ☺
[redacted] Eyes this young guy came back
[redacted] and said you sent word with
[redacted] to tell me hi. I didn't know you had
to go to court today. I thought you went
back to court on the 14th. Any way what
happen, I hope some good news. It seem's
like the both of us at had no good news
from them damn courts in awhile huh,
I sure am going to miss you when
you leave here and have to start going
to them other county's for court but that
is when we both have to start writing
alot more. Baby I am very serious about
making you my wife. If you are in
a different county when the paper's come
back I will just get my oder brother
to stand up for me and if you want his
wife can stand up for you. But which ever
way it gose I will get it done.

next Page

you know my Big Bro.'s wife Helen was related to your x Mike. I was talking to her on the phone the other night and her and my Bro said they know you. But they are on a good kick because I'am so happy and in love. Hey Baby does that sound funny or stupid coming from a man? It is how I feel and I'am a man who say's what I feel no matter what. I love and care for you Margie. you mean the world to me and I know I can't loss you. your love and caring is what is keeping me strong and fighting Baby we have something "special" between us, ((the for real thing)) our love and caring is from our hearts and is what other's wish they had in there relationship. Do you understand me Baby.

There are so many fool's out there today ever one is playing head game's with each other. I'am sure you know what I'am saying but Margie I'am for real with you and my love I have for you is coming from my heart.

next Page

Baby we are I th facing some kind of time but just like I was telling you in other letter's, I didn't want to start making any kind of deal's on this death sentence trip with out talking to you and mom. You two are the only one's I care about and care of what happen's if I get some big time. I don't plan on doing no big time and I'am sure you know what I'am talking about

I don't know Baby I just have to keep fighting and hope for the best huh.

over

Hay Baby I want you to know that
as my crime goes is robbery ! I was
there when ever thing happen but all my
part was , was robbery. But the news
paper's and T. V. news is really doggie me
by saying I was the ~~leader~~ the top dog
there. I don't no if I can beat it but
you no I'am going to fight.

any way as long as I have you by
my side I will make it and that is
a fact.
Well Sweetheart I ran out of paper so
I guess I will close for now, till tomorrow
when I can get some more. you be good
over there ok but most of all you stay
sweet for me. ☺ ok.

Love, Always
Forever & yours Man
Frank

P.S.
Margie I really do
love and care for you
and my love grow's stronger
each and ever day.
Baby I want to marriar
you, for you to become
my wife.

I know I made
some mistakes after
reading it over
sorry so sloppy

1/17/75

Hello Sweetheart
Just received your sweet
letter. Babe I didn't know why
you haven't been getting away or all
because I have been writing every day.
I at least send you one letter ever
night. Don't be sad, I like that smile
on your beautiful face.
I got called out today to talk to capt.
Rau, he wanted to no why Dave is
turning on me and he did say he
would call you out to let you no
that he is still going to give us
our visit's. He didn't say to much at
that he heard we were not brother and
sister. But the important thing is that
he isn't going to take our visit's away.
Hey Baby you are wrong about
me not wanting to spoil you I want
to spoil you as much as I can.
You are my Honey and I want you
spoil as much as I can spoil you.
Hey Baby don't lie about making the $$
inside. But as you said it will
take two good people (you & I)

my sister was taking care of
dog on the stage for me and
I was having the bucks $$ sent
to her. Don't sure you and I
on the scene and can make good
money, huh. But we will rap
more about it when we see each
other.

next page

But I'am sure you can handle your
end once you get out and I will
handle my end - cook.
So you have been a little sick huh.
I hope you get better Baby.
After talking to capt. Row Friday
I'am sure he is going to give us
one visit.
Baby I miss you so much.
and I no that you no this
man loves you. Right.
Hey Babe you know them court paper's
you sent your uncle along time ago,
Well he just got them. These damn
people went and sent the letter and
court paper's out and they went to
the post office and back here.
But I was setting here striping, reading
them and I don't see how they can
get you for assault on that case,
what does the lawyer say about
that case? Let me know ok. Have
you heard any good news on any
of the other case's yet.
I'am going to make this short
but sweet ok. I want to get it
out to you. But you remember
I love and care for you, Always.

Love, Always
Loving you Man
Frank

P.S. Write soon
I'll write you
Sorry I'm in a
little hurry
but I must
get straight
out these
lines to
you. I love
you.

12/27/64
thursday

Hello My Pretty Eyes

Baby first off I want to
say, I hope and pray that when
you receive this letter you are
in the very best of health and
fine. Just striping about the letter
from you today. I can't believe
little bit to think my dad's
think I would be like that.
around here will hear that a
assault try to talk to me with
hurting them up. I hate for
ever told you that shit in
from me. I want to know
the nigger who told you that,
Lights like.
Baby I have told you
have pab in here will
you to become my wife. Pretty Eyes I would
cancer put myself down (my
a damn fag. As soon as my
told me what you said I would
a letter right then, so you about
already got that letter but
you now that him a fan real
a man of my word. You are
woman. I want an real.
Baby it kind of hurt me
even think my Nigga would
shit like that of hear
Yes Baby I want you as my
and even have told my (family)
sister and other brother about my
in marriage you.

Pretty Eyes you mean more to me than any one or any thing. I know it is hard for both of us, being lock-down and can't be with each other but Baby my love and caring just gets stronger each and ever day I am away from you Pretty Eyes I ment it when I told you I wanted you as my wife., I would never do you wrong, I know that must sound kind of funny coming from a man, But it is how I truely feel, you are my lady and I am well pleased with you that I can truely say I am faithfull to you.

So my Love I have tryed my best to explan this to you, Margie you are a very sweet, beautiful women and I am a very proud man to be able to call you my own.

I want you to be proud of me also. for I would never hurt you in any way.

Well my Love I hope you can understand what I am trying to explain to you. there will never be any one who could take me away from you. I am yours Baby for as long as you want me.

I wite for I am hoping you want me till death do us part.

next page

Wed.
12-24-84

Dear Margie.

Hi. Hota just writing to find out how you are getting along, I hope you are fine, as for myself I am doing O.K.

Well how was your Christmas over there, it was just another day for me, nothing special. They let us all make a phone call, I called Marie to tell her and the family merry X-mas, She said to tell you Hello.

Margie what is this shit about you heard your old lover Frank is messing around with them. Fagie, whoever told you that is a fucken liar, Frank is one cell down from mine he is in cell #13 and I am in cell #1 and I don't care less and like every time he does and says. Frank don't mean shit to me and fuck Fagie so you better get that out of your head, because first they fear the Fagie on earth they separated from us.

and whoever told you that is full of shit so don't believe it. O.K. Hota.

Why didn't you answer my last letter tell that friend of yours I write to write I never got his mail from her. My old lady Linda send me some pictures of my boys they really getting big she said she is going to the Boys Club out there in California, and are on the Boxing team and both of them won medals for boxing, I wrote back and told her I was proud of them and when I get out I am going back to California

12/26/64
Wednesday 2:30

My Love

My little Bro just got back from the library and told me he saw you and that you sent word to me that you are mad because of something some little nigger told you. First off I want to know who the nigger is, his name what he looks like. I want you to send me that stuff in your next letter. Baby dig as much as I hate fags and you let some fuck say shit like that.

I am telling you and ask around you will see that I can't even look at or be around them creeps without busting them up.

I wanted to shoot this kite to you right away because I don't want my baby to think I'm a man who needs to be with fags. Man Baby that was really a blow to me coming from you. If I want release I will lay back close my eyes tight and think of "YOU" Baby what made you even believe that shit.

I want that nigger's name Margie so don't forget to send it to me ok.

I am going to go on to better things, thinking about that shit gets me a little upset.

Well I am waiting for mail call, I know I will get a letter from you calling me down but I hope there will be a sweet part in it too. I need to hear a I love you from you right now.

How was your Christmas?

Mine was lonely with out you but one day we will be out in our own home Inch. Sooner than most

12/11/64
Tuesday 8 night

Hi My Pretty Eyes

I just got up from having a sweet dream of you, It was a long sweet dream of you and I said of the first night we will spend together. It won't be long till we are together in our own home!

Well I seen my Surgeon today, they had some good news for me. They said that the U.S. Mike Little really wants to get me but that they are sure it won't be this time.

I'm trying to get a hold of Carl, My aunt came to see me awhile back and told me she would put up for house for my bond if we ever they give me a bond.

So how are things over there? Things over here are about the same, Alot of fools and fags over here, But I have a few good people I run with and the others know better than to come around us.

Baby our song is playing right now, Penny Lover, Lionel to the words, It's a sharp jam, huh. Know I told you that I love you, I do and I want to spend the rest of my life with you, making you happy taking care of you, with all my words and deeds.

Baby I do love you, I never knew that I could ever love you, you are my whole life and the only woman I want in me!

That is the truth coming from my heart

Tell your partern and Lisa I said
hello ok. Baby I sure do miss you.
I need to see you so bad.
Pretty Eyes I want you as my wife
as soon as possible, on the up & up
I want you Baby, I know I'm a
man who could and wants to take good
care of you. Baby all this is coming
from my heart and I have never
felt this way before. You make me
feel so good inside and out. I'm
always talking to your mom about you,
and me. You never have to worrien about
me Baby because I know and feel in
my heart that you are all I want or
need. You are so sweet Baby,
I can't wait to get my hands on you.
Smile because I'm going to turn you
every which way but loose. But it is going
to be like some love making you have
never had before. Just thinking about it
gets to me. But I want to please
you like know other one has in your
whole life. And I will! ☺
My Baby you keep that smile on
your face because your daddy does
love and care for you and you
can believe that no other woman can
take me away from you.
Baby I like that smile on your
face, you are so beautiful when
you are happy and I always want
you to be happy with me.

Baby you are a very sweet, beautiful
woman and I'm very proud to have the
call you my own. You make me feel so
good just knowing you are mine.
Baby I sure do miss you but it won't
be long till we are together, I promise
you that and I would never go back
on a promise to you NEVER!
Are you being good over there?
You know what I want for Christmas?
I want you ☺ all of you.
Did your mom get you know any thing
on them pictures yet? The last time
I talked to my people on the phone
they said they would put some pictures
of me in the mail for me so it should
be some time this week, but as soon
as I get them I will send them to
you, ok. How about a naked one ☺
just playing
But I think I could guess your answer.
Baby you are so good and sweet
to me. I love you so much.
I know I must say things over and
over in these letters of mine but I
also know I could never say I love you
enough times.
Well Baby we are getting ready
to eat so I'm going to close this
part of my letter for now I'm going to
wash up and make some coffee but
will be back. Kiss Sweet my Pretty Eyes
for me.

Love You Always!
Your all ways
Sweet

just got back from eating, I didn't even eat, this damn food just make's me sick.
I like to eat but I was thinking if taking a few or a lot of Lite's out of you. Smile, is that right?
Do you cook?
Well Baby I was talking to your uncle and he said that Puck was suppos to be coming down here any day. No problem, I am waiting on him and a few of my good people said they will be waiting for him also also. I will know as soon as he get's here.
I just don't want him to bother my Honey any more.
I really got a hate for that creep.
Any way Baby I had a long hot sweet dream of you, "us" last night maybe in one of my letters I will tell you about it ok. First I like to hear about one of your dreams. Baby I love you and miss you so much. I wish I could hold you in my arms right now. But I will real soon hold you tight against me.
Damn Baby I miss you!
I know you are my Honey and that is what keeps me strong.
You Sweat Sticky Pain

!

Hello My Sweat Sticky Honey

First off I hope and pray that when this letter reaches you it finds you in the very best. as for myself I am fine. I am really on a good kick but I guess the reason is because I got to visit you twice today. Baby do you know you have some sweet soft lip's, I sure like to kiss yours, Smile my Baby because this man here really does love and care for you with all my heart and soul.
Well I just got back from talking with my lawyer, I met some Dobe down there who said she knows you. So I told her to tell you hi for me and that I love you. Did she tell you?
So Sweetheart did you enjoy our visit today? I hope we get over again next week huh. Women I miss you so much. I do wish we would of met on the streets for I know that we would of already been married. I want to make you my wife. The waiting we have to do just make's my love stronger each and every day.
Well my lawyer didn't have any good news, they just said that the D.A.'s office is after me real tough this time. I don't really know how them going to go with this case yet.
But I even told my lawyer that we have to talk to be my man of

You two are the only one's I'd care about. Baby I really do love you and that is coming from my heart. I know my case looks real bad and I can get alot of time out of all this. That is why I have to let you know ever thing about my case. I don't want to loose you Baby. I know I wouldn't want to go on. Your love and caring is what is keeping me strong and fighting. Baby you are so good to me. And yes Dawn already telling spoil from you. I want to spoil you some to. You mean the world to me and I would do any thing in my prower for you. You know that don't you?

Our day will come, they can't keep us locked down for ever might. I pass it down to you at our visit but I need to hear what you think Baby. You are going to be Mrs Rodriguez pretty soon and your part of my life now. I wouldn't keep any thing from you. You have to let me know how you feel ok.

Friday I go to court to make a plea. I don't know which way I will go yet but I am thinking about pleaing not guilty and take it to trial, which means I will have to sit here for about a year fighting and then worrian about that death sentence.

next page

Baby I will make it back out, watch I am a survivor and no matter if I get long time out of this case or not I will make my move.

I want to be with you so bad to prove to you that your A-man is for real and that I do love and care for you.

We will be out there Baby building our future together. I love to see that sweet smile on your beautiful face. I want to make you happy and proud of me. I really do love you Margie. I know the both of us have been through life's up's and down's and we know what is the scoop on life. I want you to be my life now. I don't want them streets any more. We are getting to old to run any more, its about time we settle down huh, What do you think about that?

Well Sweetheart I will close for now. Last request. Good over there and most of all stay sweet for me!

Good night and Sweet Dreams my Baby.

Love Always
Forever Your Man
Frank.

P.S. You sure did look good today, good enough to eat 😊 Smile

I love you.

20c

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IN THE
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v.

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether exclusion of facts relating to prison conditions, lethal gas, and other cases in which the death penalty was not sought presents a cognizable claim particularly where petitioner's evidence opened the door to much of the prosecutorial comment of which he now complains?

2. Whether the prosecution's description of the victim's suffering and death in graphic, personalized terms, and its comments on the role of the jury denied petitioner an individualized sentencing determination?

3. Whether the instructions, particularly when taken as a whole, would have led reasonable jurors to believe that unanimity was required before any matter could be considered in mitigation?

4. Whether petitioner's constitutional rights were implicated by instructions which allowed the jury discretion to find a death sentence inappropriate after that jury found beyond a reasonable doubt that there was statutory aggravation which outweighed any and all mitigation?

5. Whether petitioner's admission of the statutory aggravators, the overwhelming evidence of abuse, torture, and suffering distinct and apart from the causing of a death, and the proof of other substantial statutory aggravation rendered harmless any failure to limit the aggravator for "especially heinous, cruel,

or depraved" killings?

6. Whether the jury instructions and statements of counsel sufficiently apprised the jury of the finality of its sentencing decision?

7. Whether the prosecution could comment upon the evidence and whether defense counsel misconstrued a comment by the trial court as an order not to object when he kept objecting after the alleged "order"?

8. Whether this Court should grant certiorari due to alleged defects in the record that do not relate to any issue raised before the Colorado Supreme Court?

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INTRODUCTORY STATEMENT

This brief opposes a petition for writ of certiorari seeking review of People v. Rodriguez, 794 P.2d 965 (Colo. 1990) which affirmed petitioner's death sentence. A copy of this decision is attached as an appendix to the petition for certiorari. This attachment includes its own appendices of pertinent statutes and jury instructions for the penalty phase of trial. Because petitioner has attached numerous other appendices including his lengthy opening and reply briefs in the Colorado Supreme Court, respondent has attached its answer brief in the Colorado Supreme Court as Appendix A only in the interest of fairness and completeness.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

On December 12, 1986, a jury convicted petitioner of the first-degree murder of 54 year old Lorraine Martelli (v. 31, pp. 2-3). See Colo. Rev. Stat. § 18-3-102 (1986). It also convicted him of first-degree sexual assault, Colo. Rev. Stat. § 18-3-402 (1986); second-degree kidnapping of a sexual assault victim, Colo. Rev. Stat. § 18-3-302(3)(a) (1986); aggravated robbery, Colo. Rev. Stat. § 18-4-302 (1986) and aggravated motor vehicle theft, Colo. Rev. Stat. § 18-4-409 (1986). The jury also adjudicated Mr. Rodriguez a violent offender subject to mandatory sentencing under Colo. Rev. Stat. § 16-11-309 (1986). On December 13, 1986, the jury adjudicated him an habitual offender subject to mandatory life sentence pursuant to Colo. Rev. Stat. § 16-13-101(2) (1986) (v. 32, p. 63). The three prior felony convictions upon which this adjudication was based were a 1975 conviction for attempted burglary, a 1979 conviction for second-degree burglary, and a 1979 conviction for aggravated robbery (id. v. 1, p. 6). Petitioner's three previous felony convictions thus subjected him to a life sentence on the basis of a convic-

tion for any of the several felonies committed against Lorraine Martelli. See Colo. Rev. Stat. 16-13-101(2) (1986).

The prior aggravated robbery conviction represented a plea-bargained disposition of a criminal episode in which Mr. Rodriguez and two companions also kidnapped and sexually assaulted a woman named Judy Archuleta (v. 33, pp. 59, 88). Evidence of these other crimes against Mrs. Archuleta was presented at the penalty phase as a similar transaction to illustrate the motives petitioner had for killing witnesses to his crimes (v. 33, pp. 58-70; see also Instructions 8 and 9 set forth in Appendix B of People v. Rodriguez, supra at 994. Evidence of how he shot a man named George Stapleton was also presented at the penalty phase for the same limited purpose (see v. 33, pp.. 6-7; see also Instructions 8 and 10 in People v. Rodriguez, supra at 994).

Evidence of how petitioner robbed, raped, tortured, murdered, and stole from Lorraine Martelli was presented at the guilt phase not at the penalty phase. See People v. Rodriguez, supra at p. 983 (jury heard no evidence that went exclusively to show especially heinous, cruel or depraved aggravation.) This evidence showed that on November 14, 1984, petitioner and his brother Chris Rodriguez, Patricia Thomas, and David Martinez kidnapped Lorraine Martelli in her own car. People v. Rodriguez, supra at 969-970. It showed how Miss Martelli was held hostage for hours and driven around the Denver area. Id. During this

time, petitioner bought beer with Miss Martelli's money and she was vaginally raped and sodomized by petitioner and his brother Chris. Id. Although Chris Rodriguez told this victim that they would probably let her go, petitioner concluded that she had seen their faces and had to be killed. Id. He elaborated on his reasoning in subsequent correspondence stating:

> I had to kill her. If I wouldn't have killed her she would of pick my picture out of the mug books from the cops.... I had to do what I did because I new [sic] that I couldn't leave any witnesses alive to come to court on me later.

(People's Exhibit Q-2, identified; v. 28, pp. 61-62, admitted; v. 28, p. 68, ll. 8-9).

The subsequent killing of Miss Martelli may aptly be described as "particularly shocking and brutal almost beyond comprehension." See People v. Rodriguez, supra, p. 983 n.15. Petitioner applied a head-lock or strangle-hold to this victim with sufficient force to fracture her thyroid cartilage and cause abrasions to her skin (v. 24, pp. 41-46). He then inflicted shallow knife wounds around this victim's neck and chin (v. 24, pp. 38-40). These wounds were referred to as "torture or teasing" injuries by a pathologist (v. 24, pp. 38-40). The victim's face would also evidence black eyes and other bruises as the result of being beaten (v. 24, pp. 47-49). Afterwards, Frank Rodriguez inflicted approximately 28 deeper stab wounds on the victim (v.

24, pp. 62-63, 210-211). Four of these knife thrusts penetrated Miss Martelli's heart (v. 24, p. 56). Six other knife thrusts penetrated a lung causing it to collapse (v. 24, p. 69). These heart and lung wounds caused the victim to die through loss of blood (v. 24, p. 71).

The prosecution argued that the cruelty inflicted on Lorraine Martelli satisfied the statutory aggravator for especially heinous, cruel, or depraved killing (Colo. Rev. Stat. § 16-11-103(6)(j) (1986); e.g., v. 34, pp. 111-112). However, the prosecution also relied on other statutory aggravation, particularly, the aggravator for avoiding prosecution by killing a witness, Colo. Rev. Stat. § 16-11-103(6)(k) (1986) (e.g., v. 34, pp. 105-107). Indeed, the prosecution emphasized that when petitioner chose to murder Lorraine Martelli, he was on parole for aggravated robbery, had three prior felony convictions, and had just kidnapped and raped a victim who could identify him and return him to prison for the rest of his life (v. 34, pp. 105-107, 120-124, 170-171, 182-185). The prosecution described how Mr. Rodriguez had a propensity to kill persons who witnessed his crimes because of previous experiences where such witnesses survived and were able to identify him (v. 33, pp. 31-45). The prosecution thus argued that punishing Lorraine Martelli's murder by anything less than death would, in effect, impose no punishment beyond what Mr. Rodriguez would have received for the

several lesser felonies committed against this victim (e.g., v. 34, pp. 182-185).

Petitioner admitted that the prosecution proved the alleged aggravators including the "especially heinous and cruel" factor (v. 34, p. 139), and he even described the death of Lorraine Martelli as "heinous and terrible" (v. 34, p. 129). Petitioner argued that it would be a "travesty of justice" to put him to death "when lesser sentences were imposed on others" (v. 34, p. 145). Petitioner argued that the "physical evidence [of who did the killing] points to David Martinez" (id.).

Evidence supporting this claim included the fact that there were knife cuts on the little fingers of both of David Martinez' hands (v. 24, pp. 84-85). The folding knife which was the murder weapon had a defective locking mechanism which could allow the blade to fold and cut the person using it (v. 24, p. 66, ll. 15-19, p. 79, ll. 16-19). However, most of the major stab wounds "were fairly regular" as if "performed by a single pattern of force" (v. 24, p. 62, ll. 4-8). This suggested that the knife blade went "clean in and clean out" without collapsing (v. 24, p. 62, ll. 4-9, pp. 65-67). The one exception which showed oddly-shape skin portions was the result of the two wounds inflicted in the same place (v. 24, p. 62, ll. 10-22). In any event, there was simply no physical evidence that the murder weapon buckled upon being thrust into the victim's body even when it struck bone

(v. 24, pp. 65-69). An examination of this weapon also showed that despite a defective locking mechanism, it could be thrust in a manner that would not cause the person using it to be cut (v. 24, pp. 67-68).

Petitioner also argued that David Martinez may have sexually assaulted the victim (e.g., v. 34, p. 144, ll. 13-18). However, the evidence supporting this argument consisted of little more than the fact that certain unidentifiable hairs turned up on the victim's body. Admittedly, one of these hairs was a human limb hair with some characteristics which were similar to Martinez' limb hair. However, these characteristics still were insufficient to permit meaningful identification (v. 28, pp. 19-22). Moreover, this hair was found in the victim's "vaginal area," not inside her anus or vagina and Martinez unquestionably handled this unclothed victim in an attempt to help carry her to the trunk of her car (v. 24, p. 213, ll. 16-21).

Petitioner contended that his letters which described how he killed Lorraine Martelli to avoid prosecution were part of a hoax to obtain a lenient disposition of charges against a female prisoner named Margie Marquez (e.g., v. 24, p. 155, ll. 14-25). However, Margie Marquez appeared as a witness and admitted that she was never promised anything for turning over the letters and that, in effect, she turned them over "for free" (v. 29, p. 128, ll. 5-15).

Petitioner claimed that his intoxication on the date of the killing mitigated the killing as did his upbringing and background (v. 34, pp. 146-150). In this regard, he presented a narrative setting forth his life history, including his criminal and institutional records. This narrative was admitted at trial as defendant's Exhibit 38 (v. 33, p. 165, see also People v. Rodriguez, supra at 971). It will be hereinafter referred to as the "life history". Mr. Rodriguez also claimed that he was sorry for his offense (v. 34, pp. 150-151) and that his character contained other redeeming qualities such as the ability to work hard, improve himself, and be valued by his family (v. 34, pp. 152-156).

Finally, petitioner claimed that he was no longer a threat to anyone, particularly when incarcerated, and that the "blackness," "emptiness," and other aspects of prison life would be sufficient punishment (e.g., v. 34, pp. 133-134, 164-167). However, petitioner's own case suggested otherwise. His life history showed how he had attempted to escape in the past, how he had been affiliated with a prison gang which harassed black prisoners, and how he was believed to be responsible for burning another inmate's cell (see Appendix B, pp. 13-14). In addition, correspondence admitted as defendant's Exhibit 20 (v. 28, pp. 81-82), showed his intention to escape, his intention to traffic in drugs while incarcerated, and biases and threats toward other

prisoners (relevant portions of this exhibit were attached to the Answer Brief in the Colorado Supreme Court, now attached hereto as Appendix A). Testimony from Margie Marquez also showed petitioner's intention to traffic in drugs while incarcerated (v. 29, pp. 96-97, 145-146). Petitioner called a witness, Dr. Kent Wilson, who discussed his anti-social personality and background (v. 33, pp. 255-260; v. 34, pp. 42, 48). On cross-examination, this witness admitted that petitioner could influence other inmates in prison (v. 34, pp. 50-51), that petitioner found institutionalization "easy" or "comfortable" (v. 34, pp. 51-52, 58-59)., and that personalities like that of petitioner enjoy violence and tend to repeat their violent acts (v. 34, pp. 54-56). Another defense witness, Judy Scholl, testified on cross-examination regarding petitioner's ability to adapt in prison (v. 33, pp. 208-210), and his participation in racially-polarized gang violence while incarcerated (v. 33, pp. 208-209).

On December 17, 1986, the jury returned a verdict imposing the death sentence (v. 3, p. 753). This verdict was upheld by the Colorado Supreme Court in People v. Rodriguez, supra.

SUMMARY OF ARGUMENT

1. Exclusion of facts relating to prison conditions, lethal gas, and other cases in which the death penalty was not

sought presents no cognizable claim particularly where petitioner's evidence opened the door to much of the prosecutorial comment of which he now complains.

2. The prosecution's description of the victim's suffering and death in graphic, personalized terms, and references to the role of the jury did not deny petitioner an individualized sentencing determination.

3. The instructions, particularly when taken as a whole, would not have led a reasonable juror to believe that unanimity was required before any matter could be considered in mitigation.

4. Petitioner's constitutional rights were not implicated by instructions which allowed the jury discretion to find a death sentence inappropriate after that jury found beyond a reasonable doubt that there was statutory aggravation which outweighed any and all mitigation.

5. Petitioner's admission of the statutory aggravators, the overwhelming evidence of abuse, torture, and suffering distinct and apart from the causing of a death and the proof of other substantial statutory aggravation rendered harmless any failure to limit the aggravator for "especially heinous, cruel, or depraved" killings.

6. The jury instructions and statements of counsel sufficiently apprised the jury of the finality of its sentencing

decision.

7. The prosecution could comment upon the evidence and defense counsel did not misconstrue a comment by the trial court as an order not to object because he kept objecting after the alleged "order".

8. This Court should not grant certiorari due to alleged defects in the record that do not relate to any issue raised before the Colorado Supreme Court.

ARGUMENT

I.

EXCLUSION OF FACTS RELATING TO PRISON CONDITIONS, LETHAL GAS, AND OTHER CASES IN WHICH THE DEATH PENALTY WAS NOT SOUGHT PRESENTS NO COGNIZABLE CLAIM PARTICULARLY WHERE PETITIONER'S EVIDENCE OPENED THE DOOR TO MUCH OF THE PROSECUTORIAL COMMENT OF WHICH HE NOW COMPLAINS.

Petitioner complains that he was not allowed to present mitigating evidence on prison conditions including the possibility of escape and future dangerousness, the pain of dying from lethal gas, and the alleged factually disproportionate nature of death as punishment in this case. This issue was not specifically raised in petitioner's briefs in the Colorado Supreme Court (see Opening Brief in Colorado Supreme Court, set forth in Appendix 5 to Petition for Certiorari). Rather, it was raised indirectly through petitioner's complaints about improper prosecutorial argument (see Opening Brief in Colorado Supreme Court, e.g., pp. 50, 67). Accordingly, this court's review should be limited to the Colorado Supreme Court's treatment of petitioner's complaints about improper prosecutorial argument. Indeed, the prejudice alleged by the petition for certiorari is argument by the prosecutors, not evidence received by the jury.

The Colorado Supreme Court noted that some of this argument was improper, specifically, the statement that this case was worse than other murders in Colorado. People v. Rodriguez, supra at 978-979. However, the Colorado Supreme Court could properly conclude that given the circumstances of this case, this impropriety was insufficient to deny petitioner a fair trial. E.g., Darden v. Wainwright, 477 U.S. 168 (1986); Donnelly v. DeChristoforo, 416 U.S. 537 (1974). This disposes of petitioner's claim that he was not permitted to present facts showing the disproportionality of seeking the death penalty here, particularly since a proportionality hearing of the kind proffered by petitioner is unnecessary to an individualized sentencing determination. McCleskey v. Kemp, 481 U.S. 279 (1987); Pulley v. Harris, 465 U.S. 37 (1984).

Any complaint that petitioner was precluded from presenting evidence of prison conditions -- specifically the difficulty of escape, and the general discomfort -- is similarly meritless.

Such evidence goes neither to the character and background of a defendant nor to the nature and circumstances of his crime. People v. Thompson, 753 P.2d 37, 70 (Cal. 1988). Moreover, petitioner opened the door to prosecutorial comment in this area. He put his entire life history, including his institutional record into evidence. This institutional record included an escape from a juvenile facility, and an attempted escape from an adult facility (Life history pp. 8, 14). In addition, correspondence introduced by petitioner evidenced boasts that he would escape (see Defense Exhibit 20). These letters also evidence threats and prejudice toward other inmates and plans to sell drugs in prison (id.). Petitioner's evidence also showed racially-motivated gang activity in prison and other misbehavior, notably burning another inmate's cell (v. 33, pp. 208-209; Life history, pp. 13-14). Finally, petitioner's witnesses testified about his ability to adapt to confinement (v. 33, pp. 208-210; v. 34, pp. 51-53, 58-59), the violent propensities of his personality-type (v. 34, pp. 42, 48, 54-56), and his ability to influence other prisoners (v. 34, pp. 50-51).

Given this evidence, there was no error in the Colorado Supreme Court's holding that the prosecutor could comment on petitioner's future dangerousness or the possibility of escape. People v. Rodriguez, supra at 976. See Tucker v. Kemp, 762 F.2d 1480, 1484 (115h Cir. 1985); Brooks v. Kemp, 762 F.2d 1383,

1405-07 (11th Cir. 1985), vacated on other grounds, sub. nom., Kemp v. Brooks, 92 L. Ed. 2d 732 (1986); Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987). See also High v. Kemp, 819 F.2d 988, 995-996 (11th Cir. 1987) (prosecutor may argue any reasonable inference which can be drawn from evidence).

Finally, evidence of the painfulness of execution by lethal gas was properly excluded as irrelevant to a jury evaluation of the crime and the offender's character and background People v. Thompson, supra at 70; Kordenbrock v. Scroggy, 680 F. Supp. 867, 910-911 (E.D. Ky. 1988), aff'd., 889 F.2d 69 (6th Cir. 1989). In this regard, the prosecutor's contrasting of the fate of Lorraine Martelli with a legal execution was not an improper comment which would cause the jury to abandon reason or objectivity. See, e.g., Darden v. Wainwright, supra; Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989); Brooks v. Kemp, supra at 1404-05; Commonwealth v. Travaglia, 467 A.2d 288, 301 (Pa. 1983). This is particularly true since the prosecutor argued that petitioner's execution would be as humane as possible because it would not involve the torture, raping, beating, and other indignities suffered by Lorraine Martelli, not because lethal gas was painless (v. 34, pp. 110-111).

II.

THE PROSECUTION'S DESCRIPTION OF THE VICTIM'S SUFFERING AND DEATH IN GRAPHIC, PERSONALIZED TERMS, AND REFERENCES TO THE ROLE OF THE JURY DID NOT DENY PETITIONER AN INDIVIDUALIZED SENTENCING DETERMINATION.

Petitioner complains that the prosecutors' references to the victim and her family violated South Carolina v. Gathers, 104 L. Ed. 2d 867 (1989); Booth v. Maryland, 482 U.S. 496 (1988); and Zant v. Stephens, 462 U.S. 862 (1983). He especially complains of comments asking jurors to imagine the discomfort of being raped or sodomized.

However, the comments complained of did not divert the jury's attention from the circumstances of the crime or the obvious effects of this incident which would have or should been known to petitioner. In this regard, the comments related to petitioner's moral culpability, and did not deprive him of the individualized sentencing determination required by Zant v. Stephens, supra.

In a capital sentencing proceeding, the jury does not attempt to decide whether particular elements have been proven but instead makes a unique individualized judgment regarding the punishment that a particular offender deserves. Zant v. Stephens, supra at 900 (Rehnquist, J., concurring). In California v. Ramos, 463 U.S. 992, 1008 (1983), this Court explained:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be divested. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury ..., the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.

(emphasis added).

As this Court has consistently held, the factors considered by the capital sentencer must include "the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280, 304 (1975) (emphasis added).

Clearly, the circumstances of the offense include the pain and suffering inflicted on a victim. Indeed, such pain and suffering provides a constitutionally acceptable means of making murderers eligible for the death penalty. E.g., Profitt v. Florida, 428 U.S. 242 (1976) (murder which is pitiless and unnecessarily tortuous to victim may render murderer eligible for death penalty). Thus, People v. Rodriguez, supra at 973-976 properly concluded that there was no violation of this petitioner's rights under Booth or Gathers.

An assessment of the circumstances of this cases from the

victim's viewpoint was particularly appropriate because:

> [A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weight the sympathetic elements of the defendant's background against those that may offend the conscience. In this process, one of the most significant considerations is the nature of the underlying crime. Hence, assessment of the offense from the victim's viewpoint would appear germane to the task of sentencing.

People v. Haskett, 640 P.2d 776, 790 (Cal. 1982); see also People v. Hovey, 749 P.2d 776, 795 (Cal. 1988) (prosecutor's remarks did not violate Booth where confined to matters obvious to any juror).

Moreover, efforts by the prosecutors to personalize the crimes against Lorraine Martelli were directly related to petitioner's moral culpability. Petitioner, was convicted of deliberate, first-degree murder, a conviction evidencing his ability to act intentionally and with an awareness of his actions. Consequently, petitioner knew or should have known that his victims would have suffered pain and discomfort when raped and sodomized. Consequently, petitioner knew or should have known that this killing denied his victim the chance to say "good-bye" to her loved ones or hear "good-byes" from them. See People v. Rodriguez, supra at 975. Similarly, petitioner knew or should

have known that Miss Martelli would never again write or receive letters, or socialize with friends, or work, or watch television. Id.

Such matters were simple, self-evident truths which personalized the victim's death in a manner which did not hold petitioner culpable for matters which could not be known or understood by him. Here, there was no submission of a detailed victim impact statement setting forth the victim's personal characteristics as well as specific instances of emotional trauma or hardship suffered by persons other than the victim. Compare Booth v. Maryland, supra at 497-506. Here, there was no detailing of specific instances of the suffering unknown to the offender such as a son's depression and insomnia or the ruined wedding of another family member. Id. Here, the prosecution correctly anticipated Booth, by declining to comment on how Lorraine Martelli's elderly mother who had relied on Lorraine for care, died a few weeks after her daughter's murder (see v. 33, p. 13, ll. 9-19). Similarly, the present case did not involve the presentation of opinions from family member or the other extensive information described in Booth, which could potentially turn the proceedings into a "mini-trial" on the victim's character and reputation.

Similarly, this case did not involve "extensive comments to the jury regarding the victim's character [which] were unnecessary to an understanding of the circumstances of the crime."

Compare South Carolina v. Gathers, supra, 109 S. Ct. at 2210 (emphasis added). Unlike Gathers, this case evidenced nothing like the detailed recitation of a lengthy prayer card whose contents were unknown to the offender. Here there was no effort to dwell on a victim's religious beliefs which had no connection to the offender's character or the circumstances of the crime. Accordingly, there is no federal constitutional issue for this court. The prosecutor's efforts to personalize the victim's death by referring to the normal, everyday things which were forever lost to Lorraine Martelli were proper under Colorado law. People v. Marin, 686 P.2d 1351 (Colo. App. 1983).

Moreover, the state has a legitimate interest in countering the mitigating evidence which a defendant is entitled to present, see, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982), by reminding the jury that the victim, like the defendant, is an individual whose death represents a unique loss of life. Booth v. Maryland, supra, 107 S. Ct. 2540 (White, Jr., dissenting). Here, petitioner's lengthy narrative of his life-history included many sympathy-evoking references to his childhood. See People v. Rodriguez, supra at 971. In addition, the jury was allowed to consider "mercy" for petitioner as well as any unspecified reason for not imposing a death sentence (see Instructions 20 and 26 set forth in People v. Rodriguez, supra at 997). Thus, there was no federal constitutional violation in personalizing the victim and

in simply reminding the jury that she had a family. Kordenbrock v. Scroggy, supra at 896. Accord Brooks v. Kemp, supra at 1409; Moon v. State, 375 S.E.2d 442 (Ga. 1988); State v. Rice, 757 P.2d 889, 906 (Wash. 1988). Indeed, petitioner discussed the victim's family and character in his closing argument stating that she was a "wonderful woman" whose loss to her family was "enormous" (v. 34, p. 165). Accordingly, petitioner should not complain of references to the victim or her family made during the prosecution's rebuttal (see v. 34, pp. 180-182). The effect of such references could only be cumulative to petitioner's own argument. See also State v. Clark, 108 N.M. 288, 302, 772 P.2d 322, 333-34, cert. denied, 110 S. Ct. 291 (1989) (prosecutor's argument may respond to defendant's discussion of life of victim).

Finally, there was simply no Eighth Amendment violation in the prosecution's references to the jury as the conscience of the community. "[I]t is the function of the sentencing jury to express the conscience of the community on the ultimate question of life or death." Booth v. Maryland, supra at 504. Here, there was no effort to have the jury substitute publicity for evidence and any references to its function as the conscience of the community simply served to underscore the seriousness of the matter and the need for fairness to both sides.

III.

THE INSTRUCTIONS, PARTICULARLY WHEN TAKEN AS A WHOLE, WOULD NOT HAVE LED A REASONABLE JUROR TO BELIEVE THAT UNANIMITY WAS REQUIRED BEFORE ANY MATTER COULD BE CONSIDERED IN MITIGATION.

Petitioner complains that a particular instruction violated Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 108 L. Ed. 2d 369 (1990) by requiring unanimity before the jury could consider a mitigating factor. The Colorado Supreme Court's treatment of this claim is dispositive People v. Rodriguez, supra at 980-982. First, it correctly held that the first paragraph of instruction 21, the alleged cause of this "Mills violation" was, at worst, ambiguous. Id. at 980. This paragraph stated as follows:

> If in the first two steps of your deliberations you have made unanimous findings that the prosecution has proven beyond a reasonable doubt that one or more aggravating factors exist and that no mitigating factors exist, or that a mitigating factor or factors exist, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the aggravating factor or factors.**1

1** Any ambiguity in this first paragraph could also be construed as simply allowing the jurors to unanimously recognize that a mitigator exists, an occurrence that could only benefit petitioner, and as properly directing the jury not to stop deliberating upon such a unanimous finding but rather to continue to the next step.

Any suggestion that this paragraph required that the jurors unanimously agree to the existence of a mitigator before weighing it against aggravation is offset by the language in this same paragraph stating that jurors must decide whether the prosecution has proven that any factors in mitigation do not outweigh aggravation. See People v. Davis, 794 P.2d 159, 194 (Colo. 1990) (nearly identical instruction did not create unanimity requirements). Moreover, this instruction, even reviewed in isolation, did not mandate unanimity as a prerequisite to the consideration of any matter in mitigation in the next step of deliberation when mitigation is weighed against aggravation. Rather, it informed the jurors that they were to weigh aggravation against any and all mitigation and that if one juror believed that mitigation outweighed aggravation, the verdict would be life imprisonment. Id.; see also People v. Rodriguez, supra at 980-982. It stated:

> If one or more of the jurors believe that a mitigating factor or factors outweigh the aggravating factor or factors found to exist, then the jury shall enter a verdict of life imprisonment.

Id. (emphasis added).

In any event, any ambiguity in the first paragraph of Instruction No. 21 was unquestionably cured by Instructions 11, 15 and 22. See People v. Rodriguez, supra at 996-97. Instruction 11 clearly removed mitigation from any burden of proof requirement and instructions 15 and 22 dispelled any conceivable

unanimity requirement. See, e.g., United States v. Hoffner, 777 F.2d 1423 (10th Cir. 1985); (relevant inquiry is whether instructions as a whole inform jury of their duties) People v. Travis, 192 Colo. 169, 558 P.2d 579 (1976) (same).

Accordingly, petitioner would argue:

> Each and everyone of you individually can rely on any factor you wish to return a life sentence. You don't have to be unanimous on those factors.

(v. 34, p. 140).

Such argument, uncontested by the prosecution, only reinforced instructions 15 and 22 and the latter portions of instruction 21 in dispelling any ambiguity regarding unanimity. Cf. People v. Wade, 44 Cal. 3d 975, 244 Cal. Rptr. 905, 750 P.2d 794, 805 (1988) (argument of counsel prevented jury from being misled by ambiguity in instruction).

IV.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT IMPLICATED BY INSTRUCTIONS WHICH ALLOWED THE JURY DISCRETION TO FIND A DEATH SENTENCE INAPPROPRIATE AFTER THAT JURY FOUND BEYOND A REASONABLE DOUBT THAT THERE WAS STATUTORY AGGRAVATION WHICH OUTWEIGHED ANY AND ALL MITIGATION.

Petitioner complains that the jury was given unbridled, unguided discretion and allowed to consider an unlimited number of factors against the accused. This argument is based largely upon

language in instruction no. 15 which applies only to the fourth and final step of jury deliberations under Colo. Rev. Stat. § 16-11-103(2)(a) (1986).**2 Significantly, the instructions only permitted the jury to reach the fourth step about which petitioner complains after the jury concluded beyond a reasonable doubt that the prosecution proved statutory aggravation and after the jury also concluded beyond a reasonable doubt that such aggravation was not outweighed by mitigation. (See Instructions 1, 3, 15, 16 and 21.) Accordingly, before the jury could exercise the unchannelled discretion of which petitioner complains, it had to first conclude beyond a reasonable doubt both that statutory aggravation existed and that this aggravation was not outweighed by mitigation. (Id.). Such mitigation included any unspecified factor "which constituted a reason for not imposing a death sentence." (See Instruction 20.) In this regard, before the jury even reached the phase of which petitioner complains, its discretion was constitutionally channelled by the requirement of a finding of statutory aggravation which narrowed the class of persons eligible for the death penalty. See, e.g., Zant v.

2** This fourth and final step appears as the third step in this statute. See Colo. Rev. Stat. § 16-11-103(2)(a)(III) (1986). However, it appeared as the fourth step of deliberations because instruction no. 15 restated a portion of the middle statutory step as an independent phase of deliberations. (See Petition for Certiorari, p. 31).

Stephens, supra; Lowenfield v. Phelps, 484 U.S. 231 (1988). Similarly, before the jury reached the phase of which petitioner complains, it had performed a weighing process in which petitioner could present anything in mitigation which pertained to his character or background or the circumstances of the crime. This afforded him a constitutionally adequate, individualized sentencing determination. See, e.g., Lockett v. Ohio, 483 U.S. 586 (1978), Woodsen v. North Carolina, 428 U.S. 280 (1976).

Here, the constitutional prerequisite for narrowing jury discretion and affording sufficient opportunity for mitigation were satisfied before the jury could even begin the final phase of which petitioner complains. Thus, the Colorado Supreme Court properly treated this issue as one which did not implicate petitioner's constitutional rights. People v. Rodriguez, supra at 986-987. It then found that the instructions were not inconsistent with Colorado's statutory scheme and that this claim therefore lacked merit. Id.

Petitioner also complains that instruction 21 allowed the weighing of aggravation and mitigation to be based on a totality of circumstances thus allowing the jury to consider irrelevant, prejudicial material (Petition for Certiorari, p. 32). However, petitioner again fails to state a federal constitutional claim and the opinion below is dispositive. It properly held that once a death sentencing scheme narrows the class of offenders eligible

for the death penalty, the federal constitution does not prohibit the consideration of aggravating facts other than statutory aggravators. People v. Rodriguez, supra at 986. Moreover, the jury was instructed to decide the case on the basis of the evidence and the instructions, see Instruction No. 1, Id. at 993, and the court below found that the death sentence was not the product of passion, prejudice, or other arbitrary factors. Id. at 990-991. This finding was made pursuant to a statutory obligation imposed on the Colorado Supreme Court, Id., and petitioner's claims of passion and prejudice are simply unfounded.

V.

PETITIONER'S ADMISSION OF THE STATUTORY AGGRAVATORS, THE OVERWHELMING EVIDENCE OF ABUSE, TORTURE, AND SUFFERING DISTINCT AND APART FROM THE CAUSING OF A DEATH AND THE PROOF OF OTHER SUBSTANTIAL STATUTORY AGGRAVATION RENDERED HARMLESS ANY FAILURE TO LIMIT THE AGGRAVATOR FOR "ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED" KILLINGS.

Petitioner complains that the Colorado Supreme Court misapplied Clemons v. Mississippi, 108 L. Ed. 2d 725 (1990) in holding the lack of a limiting definition for the "especially heinous cruel or depraved" aggravator was harmless. This argument lacks merit.

Here, the Colorado Supreme Court concluded that if the ag-

gravator had been properly limited to include only murders which were conscienceless or pitiless or unnecessarily tortuous to the victim, see Profitt v. Florida, supra, the jury would have concluded that the commission of the murder satisfied the broader definition of "especially heinous, cruel or depraved." People v. Rodriguez, supra at 983-84. In this manner alone, the Colorado Supreme Court found the lack of a limiting definition harmless beyond a reasonable doubt. Id. at 984.

Alternatively, the Colorado court also noted that no evidence was introduced in support of this aggravator which would not have been admitted for other purposes and that other aggravators were established by overwhelming evidence. Id. at 983-984. For these alternative reasons, the court below held that the inclusion of this aggravator was harmless beyond a reasonable doubt.

Both of these alternative methods of harmless error analysis are acceptable under Clemons, and because the record amply supports the Colorado court's holdings, certiorari should be denied on this issue. Id. Walton v. Arizona, 111 L. Ed. 2d 511, 528 (1990) (a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death

penalty). See also Lewis v. Jeffers, 111 L. Ed. 2d 606, 624 (1990) (de novo finding by a state appellate court that a particular offense is especially heinous or depraved is arbitrary or capricious if and only if no reasonable sentencer could have so concluded).

The court below properly concluded that the jury would have found the aggravator had they been given a proper limiting instruction. People v. Rodriguez, supra at 984. First, defense counsel admitted proof of this and other aggravators and even described the killing as "heinous and terrible." Petitioner now tries to characterize this admission as an acknowledgement of a "constitutional truism" that an ordinary person could honestly believe that every unjustified and intentional taking of human life is especially heinous." (Petitioner for Certiorari). However, this is wishful thinking. The admissions at trial were made to the jury in evidentiary terms; they were not a constitutional law argument to the court. Defense counsel stated:

> Do these aggravating factors exist, there is no question that they do. Mr. Silverman [the Prosecutor] put them up for you in graphic display, there is no question that they have been proven beyond a reasonable doubt.

(v. 34, p. 139, emphasis added).

> Make no mistake about my argument, the death of Lorraine Martelli was a heinous and terrible death.

(v. 34, p. 129, emphasis added).

Moreover, the Colorado Supreme Court's consideration of the evidence, People v. Rodriguez, supra at 984, clearly enabled it to find that the jury would have found the aggravator were it properly defined. See Walton v. Arizona, supra. This determination is was one which a reasonable sentencer could make, see Lewis v. Jeffers, supra, and thus certiorari should be denied. Indeed, the Colorado court noted how the victim was kidnapped, repeatedly raped, sodomized, beaten, and humiliated before being "murdered in a manner indicating that the defendant intended to torture her before she died." People v. Rodriguez, supra at 984. This description of the killing even understates the evidence which showed fractured thyroid cartilage from choking, torture cuts around the neck and chin and 28 deeper stab wounds only 10 of which contributed to the victim's death. In any event, the Colorado court's holdings effectively recognized that the jury could not have found the aggravator simply because a murder occurred and thus the Eighth Amendment problem identified by Maynard v. Cartwright, 486 U.S. 356 (1988) is not present here.

Indeed, the evidence that petitioner killed the victim in a conscienceless, pitiless, and unnecessarily tortuous manner was so overwhelming it excluded any reasonable possibility that the jury found the "especially heinous, cruel and depraved aggravator" simply because a killing had occurred. The evidence showed

that while Lorraine Martelli died as the result of approximately 10 knife-thrusts to the heart and lungs, she also suffered another 18 knife-thrusts to other body parts, plus "torture-cuts" to her chin and throat, plus a choking and facial beating, plus traumatic vaginal and anal penetrations (e.g., v. 24, pp. 27-32, 41-51, 60-64; v. 28, pp. 22-23).

For the jury to have found aggravation simply because a killing occurred, it necessarily would have had to disbelieve all the evidence of multiple non-lethal knife-thrusts, torture cuts, choking, beating, raping and sodomizing, but still conclude that the killing was "especially heinous and cruel and depraved" because of the several lethal stab wounds to the heart and lungs. Clearly the jury could not have found this murder "especially heinous, cruel or depraved" simply because someone died. Thus, the Colorado Supreme Court acted reasonably in concluding that the jury would have found the aggravator as properly defined. People v. Rodriguez, supra at 984; see Lewis v. Jeffers, supra.

Similarly, the court below acted reasonably in finding that the inclusion of the "especially cruel heinous or depraved" aggravator was harmless beyond a reasonable doubt. People v. Rodriguez, supra at 983-984. This aggravator was supported entirely by evidence of the facts and circumstances of the offense introduced in the guilt phase. These facts and circumstances were also admissible to prove other aggravators and to

assist the jury in the weighing of aggravation and mitigation. Id. at 983.

Indeed, once any one valid statutory aggravator was established, there was no constitutional prohibition to consideration of the facts and circumstances of the offense as non-statutory aggravators. People v. Rodriguez, supra at 986. Colorado statute provides for the admission of evidence of the nature of the crime in death-sentencing proceedings. See Colo. Rev. Stat. § 16-11-103(1)(b) (1986). Thus, the court below reasonably held that such evidence was so independently relevant to matters other than the invalid aggravator as to make inclusion of the invalid aggravator harmless. People v. Rodriguez, supra at 984. Indeed, evidence of the nature of the offense supported, among others, the aggravator for avoiding arrest or prosecution by intentionally killing a witness to an offense. Id. at 983 n.16. This aggravator was more crucial to the prosecution's case for a death sentence than the "especially heinous, cruel or depraved aggravator." The aggravator of killing to avoid arrest and prosecution was obviously related to the prosecution's position that petitioner had a strong inclination to kill witnesses to his efforts to rob or rape because of previous experience where such witnesses survived and were able to identify him (v. 33, pp. 31-45). It also related to the prosecution's argument that petitioner believed he had nothing to lose by killing Miss Martelli due to

his parole status, his prior convictions and her ability to identify him as a kidnapper and rapist vulnerable to a life sentence for his recidivism (v. 34, pp. 105-107, 120-124, 170-171, 182-185). Accordingly, the court below reasonably concluded that the "especially heinous, cruel and depraved" aggravator was not overly emphasized and its inclusion was harmless. People v. Rodriguez, supra at 983-984.

VI.

THE JURY INSTRUCTIONS AND STATEMENTS OF COUNSEL SUFFICIENTLY APPRISED THE JURY OF THE FINALITY OF ITS SENTENCING DECISION.

The Colorado Supreme Court properly concluded that this case evidenced no violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). People v. Rodriguez, supra at 984-86. Caldwell holds that a jury may not be led to believe that the responsibility for determining the appropriateness of an offender's death sentence lies elsewhere. Id. at 329. In other words, a jury should not be misled into feeling less responsible than it should for the sentencing decision. Darden v. Wainwright, supra at 184; Parks v. Brown, 860 F.2d 1545, 1549 (10th Cir. 1988). In this regard, statements or instructions which lead juries to believe that courts may also exercise sentencing functions are disallowed

because jurors might not understand that courts are limited in their ability to review the sentencing discretion of juries. See Parks v. Brown, supra at 1549 n.3. Finally, statements or instructions which are challenged as diminishing the finality of the jury's sentencing decision should be evaluated in the context in which they are made. See Darden v. Wainwright, supra at 179; Parks v. Brown, supra at 1550.

Here, the Colorado Supreme Court properly rejected allegations that certain instructions or statements led the jury to believe that the sentencing decision as to the appropriateness of the death penalty rested elsewhere. In particular, it noted how Instruction No. 2 unambiguously instructed the jurors of their "awesome responsibility" for the appropriateness of a death sentence. People v. Rodriguez, supra at 985. It also noted how this sense of responsibility was reinforced by certain statements of counsel. Id. Once again, the Colorado Supreme Court understated the evidence supporting its decision. Additional statements of counsel so thoroughly reinforced the jury's sense of responsibility as a sentencer that there can be no serious allegation of "Caldwell error" in this case.

The prosecution stated:

> Jail is not enough. There has to be more. There is more. There is the death penalty.
>
> There are two options you have in terms of sentencing, life imprisonment or death... Those are still your options; only two of

> them; life imprisonment or the death penalty. Its a difficult decision. I don't want to minimize it for you....

(v. 34, p. 113, ll. 5-22).

> The defendant was undeterred by the death penalty because he though no jury would ever give it to him. But the People submit that you are the jury.

(v. 34, p. 122, l. 25).

> We think we have all people [jurors] who can follow the law and impose the death penalty when it is appropriate as it is here....

(v. 34, p. 124, ll. 8-10).

> [p]utting someone to death is certainly not a pleasant proposition....

(v. 34, p. 125, ll. 9-10).

> We have read the bood [sic] of the Life of Frank D. Rodriguez. The People submit its a book of murder and cold-blooded violence against completely innocent citizens of Denver.... Let's make sure this is the final chapter, ladies and gentlemen. Let's close the book on Frank Rodriguez. Return a verdict of death.

(v. 34, p. 126, ll. 1-8).

This final statement using the analogy of closing the book of the life of Frank Rodriguez graphically reminded the jury that their role was that of deciding whether defendant would live or die.

Similarly defense counsel made the following general remarks in his summation:

> Frank Rodriguez will be in prison....
>
> The only question is who will decide when he dies? Will it be you or will it be God?

(v. 34, p. 127, ll. 16-17).

> It is possible for us to accomplish the purposes of protection of society and the punishment of Frank Rodriguez without taking his life, without killing. It is not necessary to take his life to punish him and to protect us.

(v. 34, p. 128, ll. 11-18).

Defense counsel then discussed the differences between the guilty and penalty phases of trial stating:

> Now the question before you is totally different. Must this man die in the gas chamber in Canon City....

(v. 34, p. 129, ll. 21-24).

> Now our society insists a person not be killed unless twelve members of this community are unanimously very, very certain of the heavy presumption we have always had in our society in favor of life has been overcome. It is your task to determine whether this case is one in which we can say with unshakeable confidence that this man must die.

(v. 34, p. 130, ll. 8-13).

> We can't tell you, but is it too much to ask that you should be convinced to your moral satisfaction before a person should die?.... Obviously, if you reach that moral decision inside and you agree that they have proven beyond a reasonable doubt that he should die then that should be your verdict....

(v. 34, pp. 138-139).

Defense counsel later criticized the prosecutor's summation and even equated a death verdict to an act of killing:

> It's easier to kill somebody if you don't think they're human and that's the point of their argument.

(v. 34, pp. 154-155).

In a similar context, defense counsel then discussed petitioner's letters and stated:

> They were supposed to make him look as vicious as possible so they [the prosecutors] could come into court and blow him up and present them to you and inflame the passions in you to kill him....
>
> You can't kill him for the terrible things he says in these letters.
>
> The prosecutor will say well, we're not telling you to kill him for that; we're telling you to kill him for what he does.

(v. 34, pp. 155-156).

Defense counsel then commented on witness Judy Archuleta stating:

> There is no question she was raped, but did she have to come into court and twist the evidence and change the facts to try to convince you to kill him?

(v. 34, p. 156, ll. 8-141).

> [The prosecutor] is urging you to kill Frank Rodriguez because of the Archuleta case, why did he let them plea bargain to aggravated robbery in 1979?

> If the case wasn't strong enough then to go to trial and get a conviction, how can it be enough to kill Frank Rodriguez today?

(v. 34, p. 158. 11. 3-12).

> The prosecutor wants you to kill Frank Rodriguez on the testimony of Patricia Thomas and Judy Archuleta....

(v. 34, p. 159, 11. 19-21).

In a different context, defense counsel stated:

> There is no way you can avoid the responsibility of voting to take the life of another human being and place it on your fellow jurors. It has to be your decision. Frank Rodriguez is entitled to twelve separate verdicts.

(v. 34, p. 160, 11. 8-12).

Finally, in closing his argument, defense counsel stated that it was not necessary to kill Frank Rodriguez and that each juror held the power to stop such unnecessary killings (v. 34, pp. 166-168).

Here, rather than causing "Caldwell error," arguments of counsel completely eliminated it.

Granted, petitioner also complains about Instruction Nos. 23, 24, a preliminary instruction and the verdict form. However, none of these items diminished the jury's sense of responsibility as a sentencer whose role was to determine the appropriateness of a death sentence. See, e.g., Caldwell v. Mississippi, supra at 329. This is particularly true when these items are viewed in

context. See, e.g., Parks v. Brown, supra at 1550. Indeed, the proper inquiry is what a reasonable juror would have understood the entire charge or set of instructions to mean. California v. Brown, 479 U.S. 538, 541 (1987); See Mills v. Maryland, supra.

No reasonable juror could have understood Instruction Nos. 23 or 25 as diminishing his sentencing responsibility for determining the appropriateness of a death sentence. Neither directive was intended to describe the jury role in sentencing, as this function was adequately performed by Instruction No. 2. Rather, Instruction No. 23 served to inform the jury how the death penalty would be carried out by prison personnel. It told the jurors to assume that their death sentence would be carried out in this manner if imposed by the court. However, it did not substitute the court for the jury as the sentencer or ultimate arbiter of the penalty's appropriateness particularly when placed in context. Similarly, Instruction No. 25, in context, could only serve to inform the jury what would happen if it found life, not death to be appropriate. To read this instruction as rendering the entire sentencing proceeding an exercise in futility because the defendant would in any event receive a life sentence is simply an unreasonable interpretation of this directive.

Similarly, the preliminary instruction of which petitioner complains (Petition, p. 46) only reinforced the jury's understanding that it exercised the sentencing functions with the

court exercising a ministerial function under which it will enter a sentence of life or death pursuant to the jury's determination. Finally, the verdict forms of which petitioner complains, scrupulously followed Colorado's statutory scheme for finding aggravation, for balancing aggravation and mitigation, and lastly, for making a statutorily-mandated finding of appropriateness. This process in no way diminished the jury's role as a sentencer particularly when read in context with Instruction No. 15 which described how this final statutorily-mandated phase was a decision solely in the discretion of the jury as to whether petitioner should be sentenced to death or life imprisonment. Placing petitioner's complaints in proper context thus shows a complete absence of "Caldwell error."

VII.

THE PROSECUTION COULD COMMENT UPON THE EVIDENCE AND DEFENSE COUNSEL DID NOT MISCONSTRUE A COMMENT BY THE TRIAL COURT AS AN ORDER NOT TO OBJECT BECAUSE HE KEPT OBJECTING AFTER THE ALLEGED "ORDER".

Petition complains of misconduct by the prosecution during closing argument. To the extent that such complaints have already been addressed in parts I and II, supra, they deserve little comment here. This is particularly true because the Colorado Supreme Court's thorough analysis of these complaints is

dispositive. People v. Rodriguez, supra at 971-979. In this analysis the court below considered each of petitioner's complaints as if an objection had been made below. Id. at 972. This analysis thus undermined petitioner's contention that he was effectively ordered not to object when the trial court cautioned him to let the prosecutor finish his argument. Id. at 990 (see also Petition for Certiorari, p. 51). Moreover, as the Colorado Supreme Court recognized, the trial court's comment to let the prosecution finish his argument could not have reasonably been construed by defense counsel as foreclosing further valid objections. Id.

Petitioner also complains about the "instructional context" of closing argument (Petition, p. 52). However, the Colorado Supreme Court's analysis of the trial court's rejection of a tendered defense instruction on prejudice, bias, public opinion and sympathy is again dispositive. People v. Rodriguez, supra at 987-88. While such an instruction would have been proper during a guilt trial, it was properly refused in a penalty phase. See, e.g., California v. Ramos, supra.

Petitioner's alleging of "many instances of misconduct" by the prosecutors (Petition, p. 52) thus fails to establish grounds for certiorari, given the Colorado Supreme Court's treatment of these issues. People v. Rodriguez, supra at 971-980. This analysis adequately addressed the constitutional issues raised by

petitioner particularly those relating to Booth and Gathers.

The court below also found that there were some instances of misconduct at trial, specifically references to the cost of life imprisonment and to knowledge that this was a worse than average first-degree murder. Id. at 978-979. However, it properly found such errors harmless beyond a reasonable doubt given the overwhelming evidence of aggravation in this case. Id. at 979.

Other instances of misconduct now raised by petitioner similarly do not present grounds for certiorari. A prosecutor may use strong, emotional language to emphasize the appropriateness of a death sentence or the ends such a sentence serves. See, e.g., Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986); Brooks v. Kemp, supra at 1404-05. Accordingly, the complaint that prosecutors used graphic language or personalized the victim's death does not state a federal constitutional claim. See Darden v. Wainwright, supra; Coleman v. Brown, supra. Such language was appropriate under Colorado law. People v. Marin, supra, and the disposition below therefore does not invite review by this court.

Similarly, prosecutors may argue reasonable inferences from the evidence. High v. Kemp, supra; Tucker v. Kemp, supra. Accordingly, petitioner states no federal constitutional claim in complaining about comment on matters set forth in evidence intro-

duced by him (e.g., Petitioner's life history and correspondence). Such evidence set forth his own racial biases and threatening remarks toward other inmates, his escape efforts, his gang and drug activity and his violent propensities (id. at pp. 8-9, 13-14; v. 33, pp. 208-210; v. 34, pp. 42, 48, 54-58). Consequently, petitioner's dangerousness while incarcerated was in evidence. See Tucker v. Kemp, supra; Brooks v. Kemp, supra at 1405-07; Campbell v. Kincheloe, supra, see also People v. Poggi, 45 Cal. 3d 306, 246 Cal. Rptr. 886, 753 P.2d 1082 (1988) (prosecutor could suggest that defendant could present danger of sexual assaults upon other inmates).**3

VIII.

THIS COURT SHOULD NOT GRANT CERTIORARI DUE TO ALLEGED DEFECTS IN THE RECORD THAT DO NOT RELATE TO ANY ISSUE RAISED BEFORE THE COLORADO SUPREME COURT.

Petitioner complains that the record was inadequate. However, he cannot complain that it was inadequate with regard to

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3** A final complaint of petitioner's unfairly takes a prosecutor's comments out of context (see Petition, p. 55). He claims that the prosecutor said he would be parole-eligible in 20 years. In context, the prosecutor mentioned the legal possibility of parole in 20 years but then told the jury to assume that their choice was the death penalty or death in prison from natural causes in 50 years (v. 34, p. 113).

any issue finally litigated before the Colorado Supreme Court. See 28 U.S.C. § 1257 (1987). In this regard, a stipulation by the prosecution along with the Colorado Supreme Court's decision to review allegations of prosecutorial misconduct as if there were contemporaneous objections enabled petitioner to litigate each of the nine issues raised in the Opening Brief despite any alleged defect in the record. The prosecution stipulated that petitioner filed a motion to strike aggravating factors and that certain instructions were tendered. (See Stipulation included in Petitioner's appendices.) Similarly, the Colorado Supreme Court even considered the consequences of petitioner's unofficial version of a transcript and found that even if petitioner's unreported version was correct there was no reversible error. People v. Rodriguez, supra at 990.

Petitioner suggests that he was prejudiced in his ability to raise other issues such as competency and jury composition. However, on appeal to the Colorado Supreme Court he did not raise or finally litigate the trial court's disposition of such issues. Rather, he litigated nine other issues in his Opening Brief. Thus, there is no final decision by the Colorado Supreme Court on issues such as competency or jury composition which can be reviewed by this court. See New York Times Co. v. Jascalevich, 439 U.S. 1317, 1318 (1978).

Moreover, petitioner was precluded from raising any such

additional issues before the Colorado Supreme Court not by the inadequacy of the record but rather by his inability to brief other such issues within a reasonable time. See People v. Rodriguez, supra at 971. Nearly 2 years passed between the docketing of this appeal in the Colorado Supreme Court; and the filing of a partial opening brief by petitioner. Id. This lengthy period of time should have been adequate to enable petitioner to raise all meritorious issues before the Colorado Supreme Court and any preclusion of other issues by the refusal of the court below to further delay this appeal should not constitute grounds for this court's review. Indeed, the hallmark of effective advocacy is that of narrowing the issues on appeal not raising every conceivable claim. E.g., Burger v. Kemp, 97 L. Ed. 638 (1987); Jones v. Barnes, 463 U.S. 745 (1983). Accordingly, the inability of petitioner to finally litigate other claims in the Colorado Supreme Court is not a basis for review by this court at this time.

CONCLUSION

The petition for for writ of certiorari should be denied. It fails to show violation of a federal constitutional right. It similarly fails to present a novel claim not previously addressed by this court or to establish a departure from precedent.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 12th day of December 1990, addressed as follows:

Michael J. Heher
Deputy State Public Defender
110 Sixteenth Street, Room 800
Denver, CO 80202

SUPREME COURT OF THE UNITED STATES

FRANK D. RODRIGUEZ *v.* COLORADO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 90-6371 (A-275). Decided January 14, 1991

The application for stay of execution of sentence of death presented to JUSTICE WHITE and by him referred to the Court is denied. The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, dissenting.

In both *Mills* v. *Maryland*, 486 U. S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U. S. —— (1990), we vacated death sentences based on jury instructions that, reasonably construed, prevented the respective juries from considering any mitigating factors they did not unanimously find to exist. Because I believe that the instructions delivered to the jury in this case cannot be squared with *Mills* and *McKoy*, I would grant the application for stay and the petition for certiorari.

I

Petitioner was convicted of murder and sentenced to death. At the penalty phase of petitioner's trial, the trial court instructed the jury that any aggravating factors found to exist should be weighed against any mitigating factors found to exist. Instruction No. 21 explained in pertinent part:

> "If in the first two steps of your deliberations you have made *unanimous findings* that the prosecution has proven beyond a reasonable doubt that one or more aggravating factors exist and that no mitigating factors exist, or *that a mitigating factor or factors exist*, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the ag-

gravating factor or factors." *People* v. *Rodriguez*, 794 P. 2d 965, 997 (Colo. 1990) (emphasis added).

In *Mills* v. *Maryland*, *supra*, we addressed the constitutionality of instructions requiring juror unanimity on mitigating factors. We concluded that such instructions violate the cardinal principle of our capital jurisprudence that "'the sentencer may not . . . *be precluded from considering* "any relevant mitigating evidence."'" 486 U. S., at 374–375, quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986), quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982). In *Mills*, an impermissible juror unanimity requirement was imposed by a jury verdict form stating: "Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist. . . ." 486 U. S., at 387. *McKoy* v. *North Carolina*, *supra*, presented a similar situation. In *McKoy*, the jury had been instructed both orally and in writing that it had to make unanimous findings on the existence of mitigating factors before proceeding to consider them. 494 U. S., at ——. Applying *Mills*, we vacated McKoy's death sentence.

Instruction No. 21 in the present case suffers from the infirmity condemned in *Mills* and *McKoy*. As noted, Instruction No. 21 directed the jury that if it "made *unanimous findings* . . . that one or more aggravating factors exist and that no mitigating factors exist, *or* that a *mitigating factor or factors exist*," it should proceed to weigh the aggravating factors against the mitigating factors. The phrase "unanimous findings" can be read only to have modified both "aggravating factors" and "mitigating factors". For the instruction to have been constitutional, the jury would have to have read the pertinent language in Instruction No. 21 as permitting it to weigh mitigating factors if it made *nonunanimous* "findings . . . that a mitigating factor or factors exist." Instruction No. 21 clearly does not say this.

The Colorado Supreme Court, however, refused to vacate petitioner's death sentence. Relying on *Boyde* v. *California*, 494 U. S. —— (1990), the Colorado Supreme Court reasoned that "there was no reasonable likelihood" that the jury would have interpreted the instruction to require juror unanimity on mitigating factors. 794 P. 2d, at 980–982. I cannot accept that our decision in *Boyde* affects the invalidity of Instruction No. 21 under *Mills* and *McKoy*.

In *Boyde*, this Court examined whether instructions at the penalty phase of Boyde's capital proceeding impermissibly limited consideration of mitigating evidence pertaining to Boyde's character and baekground. The trial court instructed the jury that, in addition to ten specific factors to be considered in determining the penalty, the jury could consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde* v. *California*, *supra*, at ——.

The Court concluded in *Boyde* that even though the instructions did not identify Boyde's deprived background and emotional troubles as relevant considerations, there was no "reasonable likelihood" that the jury felt precluded from considering these factors. Noting the view, "long held by society," that such factors "would counsel imposition of a sentence less than death," the Court found it unlikely that the jury would have understood the instructions to prevent consideration of such evidence. See *id.*, at ——. Additionally, the Court concluded that the context of the proceeding, in which Boyde introduced without objection four days of testimony concerning his background and character, "would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation." *Id.*, at ——.

The facts in *Boyde* offer little assistance in resolving this case. Unlike the jury in *Boyde*, the jury in this case could not have been guided either by the evidence introduced or by any "long held" societal views in attempting to comprehend Instruction No. 21. That instruction indicates that the jury

is required to find the existence of mitigating factors unanimously. Clearly, there is no "long held" societal view as to procedural rules of this sort. Rather, the jury's sole source of direction as to the meaning of Instruction No. 21 was the instruction itself. For the reasons I have indicated, there clearly *was* a "reasonable likelihood" that the jury viewed the direction to make "unanimous findings" as applying not only to aggravating factors but also to mitigating factors.

The Colorado Supreme Court reasoned that the jury would not have understood Instruction No. 21 in this way in light of the instructions on aggravating factors. These instructions stated on several occasions that any aggravating factors must be found unanimously, and one instruction required the jury to vote to determine the existence of particular aggravating factors. The court reasoned that the absence of similar repetition in the instructions on mitigating factors and the absence of provisions for voting upon the existence of mitigating factors precluded the jurors from inferring that unanimity was necessary for mitigating factors. 794 P. 2d, at 981–982.

In my view, this assumption is unrealistic. As a matter of convention, we presume that jurors follow jury instructions. See *McKoy* v. *North Carolina*, *supra*, at —— (KENNEDY, J., concurring in judgment). Instruction No. 21 required unanimity as to the existence of mitigating circumstances. It is difficult to imagine, then, that the jury would have inferred from the instructions setting forth the unanimity requirement with respect to *aggravating factors* a signal to disavow the clear import of Instruction No. 21.

Nor am I convinced that anything the instructions otherwise said about *mitigating factors* would have prompted the jury to disregard the link between "unanimous findings" and "mitigating factors" in Instruction No. 21. The Colorado Supreme Court suggested that the defect in Instruction No. 21 was cured by "a theme" running through the instructions "that the individual jurors could disagree with respect

to the effect they gave to mitigating factors." 794 P. 2d, at 982 (citing Instruction Nos. 15, 21 and 22).[1] However, this "theme" in the jury charge addressed only the juror's individual autonomy in deciding what weight to attach to a particular mitigating factor. The instructions said nothing to upset the indication in Instruction No. 21 that a juror could weigh a mitigating factor only after it had been unanimously found to exist. Indeed, Instruction No. 21 expressly directed the jury that it first had to find the existence of mitigating factors before weighing could take place. Instruction No. 21 explained that in the *first two steps* of its deliberations the jury was to make "unanimous findings" with respect to aggravating and mitigating factors, and it was not until "the *third step* of [the] deliberations" that the jury was to weigh the aggravating factors against the mitigating factors. *Id.*, at 997 (quoting Instruction No. 21).[2]

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[1] Instruction No. 15 stated, "If one or more jurors find sufficient mitigating factor or factors exist that outweigh a specified aggravating factor or factors, then the result is a sentence of life imprisonment." *People* v. *Rodriguez*, 794 P. 2d 965, 995 (Colo. 1990). This direction was repeated in Instruction No. 21. See *id.*, at 997. Instruction No. 22 added:

"Each of you must also decide for yourself what weight to give each mitigating circumstance that you find exists. Your decision as to what weight to give any mitigating circumstance does not have to be unanimous. You do not have to take the decisions, opinions or feelings of any other juror into account, although you may do so if you wish." *Ibid.*

[2] I also reject the Colorado Supreme Court's suggestion that the infirmity in the instructions might have been cured by defense counsel's plea in closing argument that the jurors "can rely on any factor you wish to return a life sentence . . . [and] [y]ou don't have to be unanimous on those factors." *Id.*, at 982 n. 13. Statements of counsel "are usually billed in advance to the jury as matters of argument" and "generally carry less weight with a jury than do instructions from the court." *Boyde* v. *California*, 494 U. S. ——, —— (1990). Of course, in some instances an improper argument from counsel may negate a jury instruction that correctly explains to a jury the standards governing its inquiry. *Cf. id.*, at ——. But it is an entirely different matter to presume the contrary: that an argument from counsel properly stating the law to the jury can save a jury instruction that does not.

A "commonsense understanding" of the instructions in this case, *Boyde* v. *California*, *supra*, at ——, confirms that the jury would have attached an unconstitutional meaning to Instruction No. 21. By its plain and natural meaning, Instruction No. 21 imposed a jury unanimity requirement that is incompatible with *Mills* and *McKoy*. As nothing else in the instructions can support the Colorado Supreme Court's intuitive judgment that the jury did not attach that unconstitutional meaning to Instruction No. 21, the instructions are not saved by the *Boyde* test. Because I believe that petitioner's death sentence is constitutionally defective, I would grant the application for stay and the petition for certiorari.

II

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the application for stay and the petition for certiorari and vacate petitioner's death sentence even if I did not believe this case otherwise merited review.